GAO'S RECENT REPORT ON THE IMPLEMENTATION OF EXECUTIVE ORDER 12630 AND THE STATE OF FEDERAL AGENCY PROTECTIONS OF PRIVATE PROPERTY RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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GAO'S RECENT REPORT ON THE IMPLEMENTATION OF EXECUTIVE ORDER 12630 AND THE STATE OF FEDERAL AGENCY PROTECTIONS OF PRIVATE PROPERTY RIGHTS

Thursday, October 16, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:13 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot [Chairman of the Subcommittee] presiding.

Mr. CHABOT. The Subcommittee will come to order.

The House Subcommittee on the Constitution's responsibilities include conducting oversight regarding the state of constitutionally protected property rights. Toward that end, I requested that the General Accounting Office, the GAO, report on the implementation and enforcement of Executive Order 12630, which was issued in 1988 by President Ronald Reagan.

The executive order requires Federal agencies to give due regard to the constitutional protections provided by the Fifth Amendment to private property rights, and to report on the takings implications of certain Federal agency actions. Those reports, called takings implications assessments, or TIA's, are designed to ensure that Federal agencies thoroughly assess, prior to taking action, whether or not a proposed regulation would violate the Fifth Amendment. The Fifth Amendment is violated when private property is taken for public use without just compensation. Such violations require paying just compensation from Federal taxpayer funds.

The executive order was issued to protect public funds by minimizing Government intrusion upon private property rights and to encourage Federal budgeting for the payment of just compensation. The executive order also instructs the Attorney General to develop guidelines for agencies to use in conducting TIA reports.

I wrote to the GAO and requested an investigation regarding the implementation and enforcement of the executive order in the Department of Agriculture, the U.S. Army Corps of Engineers, the Environmental Protection Agency, and the Department of the Interior. In order to determine the effectiveness of the enforcement of the order, I asked whether there were instances in which a TIA was, and was not done, and in which the Federal Government was still made to pay just compensation for the taking of private property.

On September 19th, 2003, the GAO issued its report, entitled "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use." The purpose of this hearing is to allow the GAO to present the findings of its report and to examine related issues.

The GAO reviewed nearly 400 Federal Register notices to find cases in which it was noted that TIA's were conducted in three select years—1989, 1997, and 2002. The GAO also obtained from the Justice Department a list of all takings cases related to the four agencies that were decided or resolved during fiscal years 2000 through 2002.

Generally, the GAO found that implementation of the order was lax in many ways. Although the executive order's requirements have not been amended or revoked since 1988, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents.

Further, according to GAO, there were three instances in which takings lawsuits brought against the four agencies by property owners were concluded from 2000 through 2002, and in which the requirements of the executive order applied. However, as GAO concluded, "The relevant agency assessed the takings potential of its action in only one of the three cases subject to the order's requirements." In that one case, Federal taxpayer funds were used to settle takings claims, despite the agency's conducting a TIA and concluding no takings implications existed. In the other two cases, no TIA's were conducted at all, and Federal taxpayer funds were paid to settle takings claims that were made following agency action.

In sum, of the relatively small sample of cases examined by the GAO, if takings assessments required by the executive order had been performed, and when performed, performed accurately, approximately $4.3 million in taxpayer funds might have been saved. Also, property owners might have been spared the grief of having to litigate their constitutionally protected private property rights.

One can only speculate regarding the precise savings Federal taxpayers might enjoy were the requirements of the executive order followed across all covered agency actions and over all the years the order has been in effect. However, the results of the GAO's report are not comforting, and they indicate such potential savings may well have been in the many tens of millions of dollars.

The executive order also calls for periodic updates of the Justice Department guidelines regarding the order's implementation as changes in Supreme Court cases warrant. No such updates have been made, even though Federal agency officials have indicated such updates would be useful to them, and a Congressional Research Service attorney, who has written extensively on the issue of regulatory takings, has said that the guidelines should be updated to reflect more recent Supreme Court decisions.

I look forward to hearing from all our witnesses today. We appreciate your coming here.

I will now recognize the gentleman from New York, Mr. Nadler, for 5 minutes for the purpose of making an opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

I apologize for being late, but I was at a Democratic Whip meeting debating the supplemental budget request on Iraq. I think that

subject is perhaps certainly equally important and certainly more immediate than the subject of this hearing. And for the same reason, I'm going to have to leave at 11 o'clock, whether we're finished or not.

Thank you, Mr. Chairman. The Constitution protects every American against the uncompensated taking of property for public purposes. While we may disagree at times about the appropriateness of any particular public purpose, whether that public purpose justifies the taking, what actually constitutes a taking, or what constitutes just compensation, no one would argue seriously against this fundamental principle in our Bill of Rights.

We also all agree that there are times when the regulation of private property so strips that property of its value as to entitle the owner to compensation. That much is not controversial. Where the matter gets really interesting is in determining just what constitutes a regulatory taking. Some would argue that even a small loss in the value of the property is the result of a regulation, or the loss of that property's highest and best use is a sufficient taking to require compensation.

The Supreme Court certainly has not said so, but there are several who would write into the statute books what the Constitution does not require. That is a question of policy. We have debated it before and we'll debate it again, but that's not why we're here today.

The question of regulatory takings is one that has vexed this Congress for many years, and one which has at times been called into the service of efforts to undermine the laws that protect our drinking water, that protect the air we breathe, the fisheries and crops we rely on, and the communities in which we live.

I continue to believe that no one has a right to use his or her property in a way that causes harm to others. You do not have—you do not have a property right to dump poison on the ground if you know or suspect that that poison will seep into everyone else's drinking water. The fact that this prohibition may preclude you from using your property as a profitable dump for toxic waste does not mean that the public, in essence, should have to pay you off to keep you from poisoning the wells. Even in my district in Brooklyn, you can get in big trouble for offering that kind of a deal.

Too often, people claim that they have no responsibility for the effect on others of the way they use their property, and that demanding a responsible use of that property is theft. Too often, especially as a member of the Transportation and Infrastructure Committee, my other committee assignment, I have heard it suggested that a takings analysis should ignore the cost of the property owner's actions to the rest of society, in effect, that we should only look—that we should look only at what acting responsibly might cost the owner, even what it might cost him in lost opportunity.

Today we have a much narrower question before us. The findings of a recent study by the General Accounting Office concerning implementation of President Reagan's executive order requiring that agencies conduct takings implications analysis, especially as they pertain to regulatory takings.

While some of the positions taken in the executive order were viewed at the time as to be quite extravagant, the basic goal of

avoiding inadvertent takings and unintended or unanticipated judgments is certainly worthwhile. It is hard to tell from the report whether these takings were the result of agency misunderstandings of the law, whether those misunderstandings, if they did occur, were a result of an obsolete Department of Justice guideline, whether agency negligence in not following the proper procedures was implicated, or whether, as is often the case, there was a public purpose served by the taking and the parties were compensated as part of the bargaining contemplated and mandated by the Fifth Amendment. It is not clear whether any of these takings were close judgment calls or errors or intentional.

I would also note that my colleagues on the other side of the aisle often complain that lawsuits are settled for their nuisance value and that's why we have to restrict lawsuits, because even if they lack merit, we can't rely simply upon the courts to dismiss them because they're so expensive that they're settled for the nuisance value and that's unjust. That's what many Members say.

Looking at some of the substantial—I'm sorry. Looking at some of the insubstantial settlements listed in this report, I would wonder whether the Government was making a rational calculation that it could save the public first more by settling than by joint out litigation.

It is also not clear from this report whether there has been any value added for the taxpayers by the executive order. Clearly, the general counsels of the various agencies are not going to rely on guidelines in these cases, but will assess the legal implications of their actions on their own. To do otherwise would be malpractice. It is also not clear from the report the extent to which the agencies are or are not doing these analyses. The only thing that's clear is the finding that there was not much of a paper trail.

What does matter is whether the agencies are making mistakes of law on this important question. If they are not, and the report does not seem to indicate that they are, then this entire exercise really is of mostly academic interest. If the agencies are making mistakes, then we should look at those decisions and determine what is going wrong. The question to which this GAO report responds provides little help in doing so.

Mr. Chairman, I do think the question of regulatory takings is important, and that it is very important that our Federal agencies follow the law and understand that law as they work to enforce the laws Congress has charged them with enforcing. People may not like those regulations, but that is a question for a different day.

I want to join you in welcoming our panel today, and I look forward to their testimony. I thank you and I yield back.

Mr. CHABOT. Thank you very much.

I will now introduce the panel we have here this morning. Our first witness is Anu Mittal—am I pronouncing that right?

Ms. MITTAL. Yes.

Mr. CHABOT. Thank you.

She is the Director of the Natural Resources and Environment Division of the U.S. General Accounting Office. She will present the GAO's findings in its report, entitled "Regulatory Takings, Implementation of Executive Order on Government Actions Affecting Private Property Use." We thank you for coming this morning.

Our second witness is Roger Marzulla. Mr. Marzulla is a founder and general counsel of Defenders of Property Rights, the Nation's only national public interest legal foundation dedicated exclusively to protecting private property rights. Mr. Marzulla previously served as Assistant Attorney General in charge of the U.S. Justice Department's Land and Natural Resources Division, where he was responsible for all environmental land management and natural resources litigation on behalf of the Federal Government.

He was also responsible for the Presidential Executive Order on Governmental Interference with Constitutionally Protected Property Rights, signed by President Reagan in March, 1988, that is the subject of our hearing here today. He has participated in dozens of constitutional and regulatory cases in State and Federal courts, and he is co-author with his wife, Nancie, of *Property Rights: Understanding Government Takings and Environmental Regulation*. We welcome you here this morning, Mr. Marzulla.

Our third witness is Professor John Echeverria of the Georgetown Law Center's Environmental Law and Policy Institute. He is the former General Counsel of the National Audubon Society and former General Counsel and Conservation Director of American Rivers.

He is a graduate of Yale Law School and the Yale School of Forestry and Environmental Studies, and we thank you for coming this morning as well.

Our fourth and final witness will be Steven Eagle, a Professor of Law at George Mason University School of Law, where he teaches property law, land use regulation, and constitutional law. Professor Eagle's principal research interest is the nature of private property rights and the extent to which they may be limited under the Government's police power and the power of eminent domain.

The second edition of his treatise, *Regulatory Takings*, was published in 2000, and is supplemented annually. Professor Eagle also chairs the Committee on Land Use and Zoning of the American Bar Association's Section of Real Property, Probate, and Trust Law, and he is an elected member of the American Law Institute.

Professor Eagle studied economics at the City College of New York and is a graduate of Yale Law School. We welcome all four witnesses here this morning.

As you are probably familiar, we have a 5-minute rule here and the lights will actually indicate the time. When the yellow light comes on, you will have a minute to wrap up. When the red light comes on, we would appreciate you ceasing as soon as possible after that, although if you have some parting ideas, you're welcome to add those. Then the panel here will have an opportunity to question the witnesses.

We will start with you, Ms. Mittal.

STATEMENT OF ANU K. MITTAL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Ms. MITTAL. Thank you, Mr. Chairman.

Mr. Chairman and Members of the Subcommittee, thank you for inviting us to testify on our recently completed work on regulatory

takings. Our testimony today is based on the report that you issued last week.

As you know, in 1988, the President issued Executive Order 12630, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights." The purpose of this executive order is to ensure that Government actions are undertaken on a well-reasoned basis with due regard for the potential financial impacts imposed by the Just Compensation Clause of the Fifth Amendment.

The executive order requires the Department of Justice to issue general guidelines so that Federal agencies have a uniform framework for implementing the executive order, and supplemental guidelines for each agency, as appropriate. The executive order also requires the Attorney General to update the guidelines, as necessary, to reflect fundamental changes in takings case law resulting from Supreme Court decisions.

In addition, the executive order enumerates several requirements of the agencies, such as preparing annual compilations of awards of just compensation, accounting for takings awards in their annual budget submissions, designating an official responsible for implementing the order, and considering the takings implications of their proposed actions.

Mr. Chairman, as you requested, we reviewed the measures taken by the Department of Justice to implement the provisions of the executive order, and the efforts of four agencies—Agriculture, the Army Corps of Engineers, the Environmental Protection Agency, and Interior—to comply with the executive order's requirements. In addition, we determined the extent to which awards of just compensation have been levied against the four agencies and whether the agencies had assessed the potential takings implications of their actions before implementing them.

In summary, we found the following. Justice has not updated its 1988 guidelines, and agency officials and other experts differ on the need for an update. Justice officials told us that the guidelines have not been updated because there have been no fundamental changes in regulatory takings case law.

Officials at the four agencies we talked to, however, were divided on the need for an update. While Corps and EPA officials supported Justice's position, Interior and Agriculture officials said that it would be helpful if Justice could update the summary of key takings cases contained in the guidelines. Other legal experts with whom we spoke also believe that the guidelines should be updated, and they noted that regulatory takings case law has not remained static over the past 15 years.

With respect to the supplemental guidelines required by the executive order, the Attorney General has issued them for three agencies—the Corps, EPA, and Interior—but not for Agriculture, because Justice and Agriculture could not agree on how to assess the potential takings implications of actions related to grazing and special use permits.

We also determined that the extent to which the four agencies have implemented key requirements of the executive order has changed over the life of the order. While all four agencies have designated an official to ensure that they are in compliance with this

provision, they no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents. This is because, in 1994, OMB advised the agencies that this information was no longer needed.

In addition, while officials at each of the four agencies told us that they fully consider the potential takings implications of their planned regulatory actions, they could provide us with limited evidence to support this claim, and our efforts to independently verify this claim netted limited results.

With regard to the number of takings cases brought against the agencies, we determined that, for cases concluded during fiscal years 2000 through 2002, few awards of just compensation were made against the four agencies. During this period, 44 regulatory takings cases were concluded against the four agencies. Of these 44 cases, 14 resulted in an award or settlement payment, but the executive order's requirements for takings implications assessments applied to only three of the 14 cases. For the other 11 cases, the regulatory action either predated the executive order or the matter at hand was excluded from the executive order.

More importantly, we determined that the relevant agency had assessed the takings potential of its action in only one of the three cases, subject to the executive order.

Mr. Chairman, this completes my prepared remarks. I would be happy to answer any questions that you or the Subcommittee may have.

[The prepared statement of Ms. Mittal follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives

For Release on Delivery
Expected at 10:00 a.m. EDT
Thursday, October 16, 2003

REGULATORY TAKINGS

Agency Compliance with Executive Order on Government Actions Affecting Private Property Use

Statement of Anu K. Mittal, Director,
Natural Resources and Environment

GAO-04-120T

GAO
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Highlights

Highlights of GAO-04-120T, a testimony before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

Each year federal agencies issue numerous proposed or final rules or take other regulatory actions that may potentially affect the use of private property. Some of these actions may result in the property owner being owed just compensation under the Fifth Amendment. In 1988 the President issued Executive Order 12630 on property rights to ensure that government actions affecting the use of private property are undertaken on a well-reasoned basis with due regard for the potential financial impacts imposed on the government.

This testimony is based on our recent report on the compliance of the Department of Justice and four agencies—the Department of Agriculture, the Army Corps of Engineers, the Environmental Protection Agency, and the Department of the Interior—with the executive order. (*Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015, Sept. 19, 2003).

Specifically, GAO examined the extent to which (1) Justice has updated its guidelines for the order to reflect changes in case law and issued supplemental guidelines for the four agencies, (2) the four agencies have complied with the specific provisions of the executive order, and (3) just compensation awards have been assessed against the four agencies in recent years.

www.gao.gov/cgi-bin/getrpt?GAO-04-120T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov.

October 16, 2003

REGULATORY TAKINGS

Agency Compliance with Executive Order on Government Actions Affecting Private Property Use

What GAO Found

Justice has not updated the guidelines that it issued in 1988 pursuant to the executive order, but has issued supplemental guidelines for three of the four agencies. The executive order provides that Justice should update the guidelines, as necessary, to reflect fundamental changes in takings case law resulting from Supreme Court decisions. While Justice and some other agency officials said that the changes in the case law since 1988 have not been significant enough to warrant a revision, other agency officials and some legal experts said that significant changes have occurred and that it would be helpful if a case law summary in an appendix to the guidelines was updated. Justice issued supplemental guidelines for three agencies, but not for Agriculture because the two agencies were unable to resolve issues such as how to assess the takings implications of denying or limiting permits that allow ranchers to graze livestock on federal lands managed by Agriculture.

Although the executive order's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of these requirements has changed over time as a result of subsequent guidance provided by the Office of Management and Budget (OMB). For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB issued guidance in 1994 advising agencies that this information was no longer required. According to OMB, this information is not needed because the number and amount of these awards are small and the awards are paid from the Department of the Treasury's Judgment Fund, rather than from the agencies' appropriations. Regarding other requirements, agency officials said that they fully consider the potential takings implications of their regulatory actions, but provided us with limited documentary evidence to support this claim. The agencies provided us with a few examples of takings implications assessments stating that such assessments were not always documented in writing or retained on file. In addition, our review of the agencies' rulemakings for selected years that made reference to the executive order revealed that relatively few specified that an assessment was done and few anticipated significant takings implications.

According to Justice, property owners or others brought 44 regulatory takings lawsuits against the four agencies that were concluded during fiscal years 2000 through 2002, and of these, 14 cases resulted in just compensation awards or settlement payments totaling about $36.5 million. The executive order's requirement for assessing the takings implications of planned actions applied to only three of these cases. The actions associated with the other 11 cases either predated the order's issuance or were otherwise excluded from the order's provisions. The relevant agency assessed the takings potential of its action in only one of the three cases subject to the order's requirements. According to Justice, at the end of fiscal year 2002, 54 additional lawsuits involving the four agencies were pending resolution.

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the measures taken by the Department of Justice (Justice) to implement certain provisions of Executive Order 12630 (EO) and the efforts of four agencies—the Department of Agriculture, the U.S. Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), and the Department of the Interior[1]—to comply with the EO's requirements. Our testimony is based on work included in a report recently released by this subcommittee. [2]

Each year federal agencies issue numerous proposed or final rules or take other regulatory actions that may potentially affect the use of private property. Agencies take these actions to meet a variety of societal goals, such as protecting the environment, promoting public health and safety, conserving natural resources, and preserving historic sites. At the same time, these actions may place restrictions on the use of private property, such as limiting the development of land that includes critical wildlife habitat or wetlands needed for flood control, thereby potentially depriving the landowner of the use or economic value of the property.

Any landowner believing that a government regulatory action has resulted in a taking of his or her private property may file a lawsuit seeking just compensation under the Fifth Amendment to the U.S. Constitution. In general, these suits must be brought in the United States Court of Federal Claims; Justice is responsible for litigating these cases on behalf of the government. Such cases, many of which may take years to resolve, may result in a dismissal, a decision in favor of the government, a settlement payment made to the landowner, or an award of just compensation. In general, such awards and settlements are paid from the Department of the Treasury's Judgment Fund.

In 1988 the President issued Executive Order 12630,[3] "Governmental Actions and Interference with Constitutionally Protected Property Rights," to ensure that government actions are undertaken on a well reasoned basis with due regard for the potential financial impacts imposed on the

[1]We refer to these agencies as the "four agencies" in subsequent references.

[2]See U.S. General Accounting Office, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015 (Washington, D.C., Sept. 19, 2003).

[3]53 *Fed. Reg.* 8859 (Mar. 18, 1988).

government by the Just Compensation Clause of the Fifth Amendment. Specifically, the EO requires executive branch agencies, among other things, to (1) prepare annual compilations of awards of just compensation resulting from landowner lawsuits alleging takings, (2) account for takings awards levied against them in their annual budget submissions, (3) designate an agency official responsible for implementing the order, and (4) consider the potential takings implications of their proposed actions and document significant takings implications in notices of proposed rulemaking. The EO also requires Justice, specifically the U.S. Attorney General, to issue general guidelines to provide agencies with a uniform framework for implementing the EO and to issue supplemental guidelines for each agency, as appropriate, that reflect that agency's unique responsibilities. In addition, the EO requires the Attorney General to update the general guidelines, as necessary, to reflect fundamental changes in takings case law resulting from U.S. Supreme Court decisions. Furthermore, the EO requires the Office of Management and Budget (OMB) to ensure that the policies of executive branch agencies are consistent with the EO's requirements and that just compensation awards made against the agencies are included in agencies' budget submissions.

Our testimony discusses the extent to which (1) Justice has updated its guidelines to reflect changes in case law and issued supplemental guidelines for the four agencies, (2) the four agencies have complied with the specific provisions of the EO, and (3) awards of just compensation have been assessed by the courts against the four agencies in recent years and whether in these cases, the agencies had assessed the potential takings implications of their actions before implementing them.

In summary, we found the following:

- Justice has not updated the general guidelines that it issued pursuant to the EO in June 1988, but has issued supplemental guidelines for three of the four agencies. Officials at Justice, the Corps and EPA expressed the general view that changes in takings case law related to Supreme Court decisions since 1988 had not been significant enough to warrant a revision of the guidelines. Justice officials also noted that the guidelines were intended to provide a general framework for agencies to follow in implementing the EO, and thus did not require frequent revision. However, Interior and Agriculture officials said that it would be helpful if Justice updated a summary of the key aspects of relevant case law contained in an appendix to the guidelines to reflect significant developments over the past 15 years. Similarly, representatives of property rights groups and law professors stated

that the guidelines should be updated, noting that the body of relevant case law has evolved significantly over the past 15 years. Justice has issued supplemental guidelines for all of the individual agencies except Agriculture.

- The four agencies' implementation of some of the EO's key provisions has changed over time in response to subsequent OMB guidance. The agencies have not prepared annual compilations of just compensation awards or accounted for these awards in their budget documents since OMB issued guidance in 1994 advising agencies that this information is no longer required. Regarding the EO requirement for designating an official responsible for ensuring the agency's compliance with the EO, the four agencies have each designated such an official—typically the chief counsel, general counsel, or solicitor. Finally, the four agencies told us that they fully consider the potential takings implications of their planned regulatory actions, but they provided us with limited documentary evidence to support this claim. Specifically, agency officials told us that takings implication assessments are not always documented in writing, and with the passage of time any assessments that were documented may no longer be on file with the agency.

- According to Justice data, property owners or other parties brought 44 regulatory takings cases against the four agencies that were concluded during fiscal years 2000 through 2002. Of these, the courts decided in favor of the plaintiff in 2 cases, resulting in awards of just compensation totaling about $4.2 million. The Justice Department settled in 12 other cases, providing total payments of about $32.3 million. The EO's requirements for assessing the takings implications of planned regulatory actions applied to only 3 of these 14 cases. For the other 11 cases, the associated regulatory action either predated the EO's issuance or the matter at hand was otherwise excluded from the EO's provisions. Based on the evidence made available to us, the relevant agency assessed the takings potential of its action in only one of the three cases subject to the EO's requirements. As of the end of fiscal year 2002, Justice reported that 54 additional regulatory takings cases involving the four agencies were pending resolution.

Background

The just compensation clause of the Fifth Amendment provides that the government may not take private property for public use without just compensation. Initially, this clause applied to the government's exercise of its power of eminent domain. In eminent domain cases, the government invokes its eminent domain power by filing a condemnation action in court against a property owner to establish that the taking is for a public use or purpose, such as the construction of a road or school, and to allow

the court to determine the amount of just compensation due the property owner. In such cases, the government takes title to the property, providing the owner just compensation based on the fair market value of the property at the time of the taking. Supreme Court decisions later established that regulatory takings are also subject to the just compensation clause. In contrast to the direct taking associated with eminent domain, regulatory takings arise from the consequences of government regulatory actions that affect private property. In these cases, the government does not take action to condemn the property or offer compensation, but rather effectively takes the property by denying or limiting the owner's planned use of the property, referred to as an inverse taking.[4] An owner claiming that a government action has effected a taking and that compensation is owed must initiate suit against the government to obtain any compensation due.[5] The court awards just compensation to the owner upon concluding that a taking has occurred.

In 1987, concerned with the number of pending regulatory takings lawsuits and with court decisions seen as increasing the exposure of the federal government to liability for such takings, the President's Task Force on Regulatory Relief began drafting an executive order to direct executive branch agencies to more carefully consider the takings implications of their proposed regulations or other actions. The President issued this EO on March 15, 1988.

According to the EO, actions subject to its provisions include regulations, proposed regulations, proposed legislation, comments on proposed legislation, or other policy statements that, if implemented or enacted, could cause a taking of private property. Such actions may include rules and regulations that propose or implement licensing, permitting, or other conditions, requirements or limitations on private property use. The EO also enumerates agency actions that are not subject to the order, including the exercise of the power of eminent domain and law enforcement actions involving seizure, for violations of law, of property for forfeiture, or as evidence in criminal proceedings.

[4]In general, an inverse taking has the effect of an affirmative exercise of the power of eminent domain. An inverse taking is also referred to as inverse condemnation.

[5]Takings of property effected by government actions may occur in a number of ways, including: (1) a government regulation restricting development, (2) a government requirement that a landowner provide the public access to private property (such as by providing access to a private beachfront), and (3) an agency's denial of a mineral drilling permit.

The EO also requires the U.S. Attorney General to issue general guidelines to help agencies evaluate the takings implications of their proposed actions, and, as necessary, update these guidelines to reflect fundamental changes in takings case law resulting from Supreme Court decisions.

The guidelines provide that agencies should assess takings implications of their proposed actions to determine their potential for a compensable taking and that decision makers should consider other viable alternatives, when available, to meet statutorily required objectives while minimizing the potential impact on the public treasury. In cases where alternatives are not available, the potential takings implications are to be noted, such as in a notice of proposed rulemaking. The guidelines also include an appendix that provides detailed information regarding some of the case law surrounding considerations of whether a taking has occurred and the extent of any potential just compensation claim. For example, the appendix discusses the Penn Central Transportation Co. v. City of New York[6] case in which the Supreme Court set out a list of three "influential factors" for determining whether an alleged regulatory taking should be compensated: (1) the economic impact of the government action, (2) the extent to which the government action interfered with reasonable investment-backed expectations, and (3) the "character" of the government action. However, the appendix provides a caveat that it is not intended to be an exhaustive account of relevant case law, adding that the consideration of the potential takings of an action as well as the applicable case law will normally require close consultation between agency program personnel and agency counsel.

Justice Has Not Updated Its 1988 Guidelines, but Has Issued Supplemental Guidelines for Three of Four Agencies

Agency officials and other experts differ on the need to update the Attorney General's guidelines to reflect changes in regulatory takings case law since 1988. Justice officials said that the guidelines had not been updated since 1988 because there had been no fundamental changes in regulatory takings case law, which is the EO's criterion for an update. They said that the guidelines, as written, are still sufficient to determine the risk of a regulatory taking and that subsequent Supreme Court decisions have not substantially changed this analysis. For example, officials said the three-factor test outlined in the 1978 Penn Central case remains the most important guidance for analyzing the potential for a taking that is subject to just compensation. Justice officials also emphasized that the guidelines address only a general framework for

[6]438 U.S. 104 (1978).

agencies' evaluations of the takings implications of their proposed actions and thus are not intended to be an up-to-date, comprehensive primer on all possible considerations. The guidelines state that the individual agencies must still conduct their own evaluations, including necessary legal research, when assessing the takings potential of a proposed regulation or action.

The four agencies were divided on the need to update the guidelines. Corps and EPA officials supported Justice's position that the guidelines do not need to be updated. Corps staff indicated that, based on their review of relevant Supreme Court decisions since 1988, no fundamental change in the criteria for assessing potential takings had occurred and thus no update to the Attorney General's guidelines was necessary. Similarly, EPA staff said that some of the takings cases decided since 1988 gave the appearance that the Court was changing the three-pronged test set out in the Penn Central decision. However, these officials noted that more recent cases have returned to the Penn Central test, thereby removing the need for updating the Attorney General's guidelines. In contrast, officials at Interior and Agriculture said that it would be helpful if Justice updated the summary of key takings cases contained in an appendix to the guidelines to reflect significant developments in this case law over the past 15 years.

Other legal experts said that the Attorney General's guidelines should be updated, noting that regulatory takings case law had not remained static over the past 15 years. For example, legal experts concerned with the protection of private property rights said that there had been significant developments in regulatory takings case law since 1988. These experts said that the mere passage of time and the sheer number of regulatory takings cases concluded since 1988 argued for updating the guidelines. In another case, a law professor, who has written and lectured on the issue of regulatory takings, said that the level of specificity with which Justice prepared the original guidelines sets a precedent that calls for updating these guidelines to reflect the many important changes in regulatory takings case law since 1988.

The Attorney General has issued supplemental guidelines required by the EO for three of the four agencies—the Corps, EPA, and Interior.[7] The EO

[7]Justice issued supplemental guidelines for the Corps on January 23, 1989; for Interior on March 29, 1989; and for EPA on January 14, 1993. According to Justice and agency officials, these guidelines have not been updated since their original issuance.

directed the Attorney General, in consultation with each executive branch agency, to issue supplemental guidelines for each agency as appropriate to the specific obligations of that agency. The Attorney General's guidelines state that the supplement should prescribe implementing procedures that will aid the agency in administering its specific programs under the analytical and procedural framework presented in the EO and the Attorney General's guidelines, including the preparation of takings implication assessments. In general, the three agencies' supplemental guidelines include specific categorical exclusions from the EO's provisions for certain agency actions.

The Attorney General has not issued supplemental guidelines for Agriculture because Justice and Agriculture could not agree on how to assess the potential takings implications of the latter agency's actions related to grazing and special use permits covering applicants' use of public lands.[8] Agriculture argued that such permit actions should be exempt from the EO's requirements or, if not, that the agency should be allowed to do a generic takings implication assessment that would apply to multiple permits. Agriculture officials indicated that Justice officials did not agree with these suggestions, and the matter was never resolved. While lacking supplemental guidelines, Agriculture officials said that their implementation of the EO and the Attorney General's guidelines has not been encumbered. Justice officials agreed with this assessment.

Implementation of Key Provisions by the Four Agencies Has Changed Over the Life of the Executive Order

Although the EO's requirements have not been amended or revoked since 1988, the four agencies' implementation of some of its key provisions has changed over time in response to subsequent OMB guidance. For example, the agencies no longer prepare annual compilations of just compensation awards or account for these awards in their budget documents because OMB guidance issued in 1994 advised agencies that such information was no longer required.[9] According to OMB, this information is not needed because the number and amount of these awards are small and the awards were not paid from the agencies' appropriations but are paid from the Department of the Treasury's Judgment Fund. In addition, because the

[8] A grazing permit provides official written permission to a rancher to graze a specific number, kind, and class of livestock for a specified time period on defined federal rangeland. A special use permit is a written instrument that grants rights or privileges of occupancy and use, such as for recreational and commercial purposes, subject to specified terms and conditions.

[9] The agencies had difficulty documenting their submission of compilations reports for the period 1989 through 1993 because the passage of time made documents less accessible.

number and dollar amounts of just compensation awards and settlements paid by the federal government annually are relatively small, OMB officials said the overall budget implications for the government are small. Hence, in their view, information on just compensation awards in agency annual budget submissions was also unnecessary.

OMB and Justice officials said that the relative lack of regulatory takings cases and associated just compensation awards each year is an indication that the EO has succeeded in raising agencies' awareness of the need to carefully consider the potential takings implications of their actions.

Although OMB no longer requires agencies to comply with these EO provisions, the provisions remain in the EO. However, OMB and Justice officials noted that because executive orders are not the equivalent of statutory requirements, non-compliance with these provisions does not have the same implications. Instead, executive orders are policy tools for the executive branch and are subject to changing interpretation and emphasis with each new administration.

Other provisions of the EO have been implemented. For example, each of the four agencies has designated an official to be responsible for ensuring that the agency's actions comply with the EO's requirements. In general, the responsible official at each agency is the agency's senior legal official.[10] EPA's and Interior's supplemental guidelines specifically identify the designated official by title. Agency officials could not provide us with any documentary evidence of this designation for Agriculture and the Corps, but agency officials assured us that their senior legal official fulfilled this role.

Officials at each of the four agencies said that they fully consider the potential takings implications of their planned regulatory actions, but again provided us with limited documentary evidence to support this claim. Agencies provided us a few written examples of takings implication assessments. Agency officials said that these assessments are not always documented in writing, and, with the passage of time, any assessments that were put in writing may no longer be on file. They also noted that these assessments are internal, predecisional documents that generally are not subject to the Freedom of Information Act or judicial review. As a

[10]At Agriculture and EPA, the designated official is the General Counsel. At the Corps, this official is the Chief Counsel. At Interior, the designated official is the Solicitor.

result, they said, the assessments are not typically retained in a central file for a rulemaking or other decision, and therefore difficult to locate. For example, the Corps internal guidance states that takings implication assessments should be removed from the related administrative file once the agency has concluded a decision on a permit. In addition, agency officials also noted that they do not maintain a master file of all takings implication assessments. In many cases, attorneys assigned to field offices conduct these assessments. In these cases, agency officials said that headquarters staff might not have copies. Nevertheless, with the exception of EPA, each agency provided us with some examples of written takings implication assessments.[11] These assessments varied in form and the level of detail included.

To determine if and how the four agencies documented their compliance with the EO when issuing regulatory actions, we reviewed information contained in Federal Register notices on takings implication assessments related to their proposed and final rulemakings, but had limited success. Specifically, 375 notices mentioned the EO in 1989, 1997, and 2002, but relatively few provided an indication as to whether a takings implication assessment was done. Most of these rules included only a simple statement that the EO was considered and, in general, that there were no significant takings implications. In contrast, 50 specified that an assessment of the rule's potential for takings implications was prepared, and of these, 10 noted that the rule had the potential for "significant" takings implications. Given the limited amount of information available from the agencies or available in the Federal Register notices that we reviewed, we could not fully assess the extent to which agencies considered the EO's requirements.

[11]EPA officials indicated that they did not have any written examples of takings implication assessments prepared by the agency largely because the agency's actions are generally excluded from the EO's requirements.

Few Awards of Just Compensation Were Made Against the Four Agencies for Takings Cases Concluded during Fiscal Years 2000 through 2002

According to Justice data, 44 regulatory takings cases against the four agencies were concluded during fiscal years 2000 through 2002.[12] Fourteen of these 44 cases resulted in government payments. In 2 of these 14 cases, the U.S. Court of Federal Claims decided in favor of the plaintiff, resulting in awards of just compensation totaling about $4.2 million. The Justice Department settled in 12 other cases providing total payments of about $32.3 million.[13] Of these combined 14 cases with awards or settlement payments, 10 related to actions of Interior, 3 to actions of the Corps , and 1 to an action of Agriculture.

In general, the settled cases were concluded with compromise agreements, including stipulated dismissals or settlement agreements, reached among the litigants and approved by the applicable court. In these cases, the document usually stated that the parties had agreed to end the case with a payment to the plaintiff, but no finding that a taking occurred. For example, in one case concluded in 2001 that alleged a taking of an oil and gas lease on federal land managed by Interior's Bureau of Land Management, the litigants negotiated a stipulated dismissal that provided that a payment of $3 million be made to the plaintiffs to cover all claims. However, the stipulated dismissal also provided that the final outcome should not be construed as an admission of liability by the United States government for a regulatory taking. In addition, the dismissal required that the plaintiffs surrender their interests in a portion of the lease. In the two cases with award payments, the court concluded that a taking had occurred and thus it awarded just compensation.

Of the 14 cases with awards or settlement payments, the 10 Interior cases generally dealt with permits related to mining claims on federal lands managed by that agency or matters related to granting access on public lands. For example, one case involving mining claims resulted in the plaintiff receiving a settlement of almost $4 million. In another case,

[12]The data provided by Justice referred to these 44 cases as regulatory takings cases. According to information provided by Interior, at least 9 of the 44 cases, including 4 with award or settlement payments, were alleged by the property owner to be "legislative" takings. In legislative takings cases, the potential taking results directly from an act of Congress. One of these nine cases (*Board of County Supervisors of Prince William County, Virginia v. United States*) involved the government's taking title to property by exercising its power of eminent domain.

[13]In addition to the financial remuneration made to the plaintiff, the award and settlement payment totals may include compensation for attorney fees, interest, and other litigation costs.

involving the denial of preferred access to a lake on land managed by the agency, the plaintiff received a settlement of $100,000. The Corps' three cases generally related to a denial or issuance, with conditions, of wetlands permits for private property. One of these cases, concerning the filling of a wetland in Florida, resulted in a settlement payment of $21 million, accounting for more than half of the total compensation awards and settlement payments related to the 14 cases. The Agriculture case concerned the title to mineral rights in a national forest managed by the agency. The plaintiff received an award of $353,000 in this case. (Appendix I provides further information on just compensation awards or settlement payments, by agency, for cases concluded during fiscal years 2000 through 2002.)

In addition to the cases concluded during fiscal years 2000 through 2002, Justice reported that an additional 54 regulatory takings cases involving the four agencies were still pending resolution at the end of fiscal year 2002. Of the 54 pending cases, 30 involved Interior, 14 involved the Corps, 7 involved Agriculture, and 3 involved EPA.

The EO's requirements for assessing the takings implications of planned regulatory actions applied to only 3 of these 14 cases. For the other 11 cases, the associated regulatory action either predated the EO's issuance or the matter at hand was otherwise excluded from the EO's provisions.

Based on evidence made available to us, the relevant agency assessed the takings potential of its action in only one of the three cases subject to the EO's requirements. In that case, the Corps denied a wetlands permit sought by the plaintiff to fill wetlands on the plaintiff's property in order to develop a commercial medical center. The plaintiff brought suit against the agency alleging a compensable taking had occurred. In its takings implication assessment, the Corps had concluded that the permit denial did not constitute a taking because the applicant was still free to use the property for other purposes that did not involve filling the wetland. Therefore, the Corps concluded that the permit denial did not deprive the plaintiff of all viable economic use of the property. However, the case ended with a stipulated dismissal and a payment of $880,000 to the plaintiff.[14]

[14]*James Koconis & Ted G. Koconis v. United States.*

In the two other cases, based on information Interior provided to us, it appears that the EO would apply. Interior stated that, in hindsight, it appears that the EO may have applied in the first case involving a denial of applications to drill for oil and gas on federal land. Although a formal takings implication assessment was not prepared in this case, Interior stated there was a "good faith" discussion of its takings implications within the department. The case concluded with settlement of $380,000 to the plaintiff for attorney fees.[15] In the second case, concerning anticipated and actual denial of oil and gas drilling permits for federal land, Interior was not certain whether the EO actually applied to the case in the first place, but believed that a takings assessment had been done and documented in a related environmental impact statement. However, Interior was unable to provide us a copy of this document. We believe that the EO applied and, lacking documentation, that no formal assessment was done. This case concluded with a settlement of $3 million for the plaintiff.[16]

Mr. Chairman, this completes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have at this time.

GAO Contacts and Staff Acknowledgment

For further information about this testimony, please contact me at (202) 512-3841. Doreen Feldman, Jim Jones, Ken McDowell, Jonathan McMurray, and John Scott, made key contributions to this statement.

[15]*Devon Energy Corporation, et al. v. United States.*

[16]*W.A. Moncrief, Jr. et al. v. United States.*

Appendix I: Awards of Just Compensation or Settlement Payments for Concluded Regulatory Takings Cases, for Four Agencies, Fiscal years 2000 through 2002

(Dollars in thousands)

Agency	Number of Concluded Cases	Number of Cases with Payments	Just Compensation Awards	Settlements	Total
Agriculture	1	1	$353	$0	**$353**
Corps	15	3	0	22,085	**22,085**
EPA	2	0	0	0	**0**
Interior	26	10	3,851	10,216	**14,067**
Total	**44**	**14**	**4,204**	**$32,301**	**$36,505**

Source: GAO.

Note: GAO analysis of data provided by the Department of Justice's Environment and Natural Resources Division

Mr. CHABOT. Thank you very much.

Mr. Marzulla, you are recognized for 5 minutes.

STATEMENT ROGER J. MARZULLA, FOUNDER AND GENERAL COUNSEL, DEFENDERS OF PROPERTY RIGHTS

Mr. MARZULLA. Thank you, Mr. Chairman.

Since the signing of the executive order in 1988 into the extent and nature of governmental compliance with that executive order, I take a special interest in this inquiry because of the position I held at the time, being designated by Attorney General Edwin Meese to spearhead the effort to draft both the executive order and the Attorney General's guidelines.

Today, the Defenders of Property Rights has issued a report which in some ways parallels the findings of the General Accounting Office, the Government's Accounting Office. And that report, Mr. Chairman, confirms that, regrettably, there is a massive noncompliance with the executive order throughout the Executive branch, and that the cost of that noncompliance is in the range of at least one billion dollars.

Every day, we at the Defenders of Property Rights hear from individuals who request help in dealing with governmental actions, regulations, orders, requirements, that have caused them to lose their property rights. I might add, Mr. Chairman, not one of the people I have talked to over the years, the thousands of people I have talked to, has been dumping toxic waste on his property and complaining about not being able to do so.

The Founding Fathers recognized the fundamental role of property rights in a free society. They recognized that an individual who cannot retain the fruits of his or her labor is at risk of losing all of the individual liberties that are guaranteed by the Constitution. Today, unfortunately, Mr. Chairman, I think we must report that perhaps our most endangered liberty is private property rights.

The executive order, as the chair has noted, was instituted for two purposes. One, to protect our precious constitutional liberties, and two, to protect the taxpayer's purse. Failure to observe the requirements of that executive order, which we consider a "look before you leap" type of approach, has cost taxpayers' hundreds of millions, probably billions, of dollars.

I would note today that 19 States have adopted similar statutes—that is, statutes which have established the requirements of an executive order-type analysis as part of their regulatory programs. They have found beneficial results in protecting private property rights and protecting the public purse.

The findings of our report indicate that, as the GAO indicates, there are fundamentally no records of takings implication analyses being done. There are, in fact, no records of how much the Government has paid out for the failure to observe private property rights and the failure to pay just compensation. There are no reports to OMB, even though they are required, and even though the purpose of that requirement was to apprise the Congress of the extent to which agencies have been violating the Constitution, violating private property rights, and have been required to pay as a result.

Fundamentally, we found that of the 400 cases both filed and resolved over the period from 1991 to August of 2003, the Government had judgments awarded of approximately $112 million against it. There were settlements, the amount of which we could not gather, but since it was about twice as many cases, we assumed that was about twice as much money, or about $225 million; that is to say, about a third of a billion dollars.

We must assume that all of those people who could not afford to hire lawyers, to file suit and go through the litigation process, to obtain their constitutionally-guaranteed right of just compensation, probably amount to at least three times, maybe four or five or six or ten times, the number who actually received the payment that the Constitution entitles them to.

We have three major recommendations for this Committee. The first is certainly to update the Attorney General's guidelines. The Supreme Court has decided a dozen or more important cases, and the guidelines themselves have not been updated to take account either of those cases or decisions of the Court of Appeals for the Federal Circuit, which has jurisdiction over all takings cases brought against the Federal Government.

Second, we recommend that the agency guidelines be updated in parallel with those of the Attorney General.

And finally, we recommend that Congress take action, recognizing that the executive order, as a voluntary requirement, is not working, to make it legally binding upon Government agencies.

Mr. Chairman, I would be happy to answer any questions.

[The prepared statement of Mr. Marzulla follows:]

PREPARED STATEMENT OF ROGER J. MARZULLA

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity of testifying today with respect to the federal government's implementation of Executive Order 12,630, *"Governmental Actions and Interference With Civil Constitutionally Protected Property Rights."* I congratulate the Subcommittee on instituting the first inquiry in more than a decade into whether federal agencies are complying with their obligations under the Takings Executive Order, which is designed to protect individual constitutional liberties in property while saving money for the federal government. Regrettably, in a report issued today by Defenders of Property Rights, we conclude that widespread noncompliance with the Takings Executive Order has resulted in massive violation of constitutionally-guaranteed property rights, subjecting the federal government to liability for $1 billion or more.

I take special interest in this Subcommittee's investigation because, as an attorney with the United States Justice Department, I had the honor of being designated by former Attorney General Edwin Meese III to head up the team that helped draft the Takings Executive Order and the Attorney General's guidelines. Today, I serve as General Counsel to Defenders of Property Rights, the nation's only nonprofit legal foundation dedicated exclusively to the protection of our cherished constitutional right to own, use and possess private property. At Defenders of Property Rights, every day we receive urgent requests for help in vindicating constitutionally guaranteed property rights from homeowners and retirees, farmers and ranchers, small businessmen, and ordinary Americans who see government with impunity destroying their homes, their businesses and their dreams. The Takings Executive Order was designed to minimize this violation of constitutionally-protected property rights, but it can do so only if federal agencies comply with the analytic and planning tools which the Takings Executive Order provides.

I. WHY CONSTITUTIONAL PROPERTY RIGHTS ARE IMPORTANT

If you believe in individual freedom, then you must believe in property rights. As the Supreme Court has said:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The protection of rights in property lies at the heart of our constitutional system of government. The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty dating back to the Justinian Code, Magna Carta, and the Two Treatises of John Locke, all of which recognize the importance of property ownership in a governmental system in which individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers vested him with the ability to deprive his subjects of their God-given rights of "life, liberty, and property."

The United States Constitution imposes a duty on government to protect private property rights. Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects . . ." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation . . ." The Fourteenth Amendment echoes the Due Process Clauses of the Fifth Amendment, stating that no "State shall deprive any person of life, liberty, or property without due process of law . . ." Additionally, the Contracts Clause of the Constitution indirectly protects property by forbidding states from passing any "law impairing the Obligation of Contracts."

The protection of private property receives such strong emphasis in the United States Constitution because the right to own and use property was historically understood to be critical to the maintenance of a free society. To understand this concept, one must understand that property is more than just land. Property is buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruit of one's labor and the ability to use, enjoy, and exclusively possess the fruits of one's labor is the basis for a society in which individuals are free from oppression. Arguably, there can be no true freedom for anyone if people are dependent upon the State for food, shelter, and other basic needs. Under such a system, nothing is safe from being taken by a majority or a tyrant because the citizens, as government dependents, are powerless to oppose any infringement of their rights.

The United States Supreme Court has repeatedly explained that the primary purpose for protecting property rights is to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[1] During the birth and growth of the administrative regulatory state, federal government agencies ignored these principles and implemented policies that deprived owners of the use and benefit of their property without providing compensation. Moreover, Congress consistently failed to codify property rights protection into federal law and the judicial system's maze-like procedures and hurdles made seeking redress for the infringement of private property rights in the courts impractical for many property owners. Thus, private property rights have become one of our most endangered liberties.

II. THE TAKINGS EXECUTIVE ORDER

In June of 1987 the United States Supreme Court handed down two blockbuster cases, *First English Evangelical Church v. County of Los Angeles*[2] and *Nollan v. California Coastal Commission*.[3] The *First English* and *Nollan* cases sent a shock wave through the federal government, where new and far-reaching regulatory programs such as Superfund,[4] the Clean Water Act,[5] and the Endangered Species Act[6]-all good ideas-could now not be implemented without paying for the private property rights taken in the process. Former United States Attorney General Edwin Meese III was among the first to realize that the government lacked any plan for avoiding unnecessary regulatory takings, or for paying those whose property had been taken by regulation. His concerns quickly reached the White House and the Office of Management and Budget-and the President.

Accordingly, in his legislative and administrative message to the Congress of January 25, 1988, President Reagan discussed the significance of these two landmark Supreme Court decisions, simultaneously reaffirming the central importance of property rights to our constitutional system and the need to plan for inevitable just compensation obligations of the government:

> It was an axiom of our Founding Fathers and free Englishmen before them that the right to own and control property was the foundation of all other individual liberties. To protect these rights, the Administration has urged the courts to restore the constitutional right of a citizen to receive just compensation when government at any level takes private property through regulation or other means. Last spring, the Supreme Court adopted this view in Nollan v. California Coastal Commission. In a second case, the Court held that the Fifth Amendment requires government to compensate

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[1] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[2] 482 U.S. 304 (1987).
[3] 483 U.S. 825 (1987).
[4] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2003).
[5] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (2003).
[6] 16 U.S.C. §§ 1531 et seq. (2003).

> citizens for temporary losses that occur while they are challenging such a government regulatory "taking" in court. In the wake of these decisions, this Administration is now implementing new procedures to ensure that federal regulations do not violate the Fifth Amendment prohibition on taking private property; or if they do take a citizen's property for public use, to ensure that he receives constitutionally required just compensation.[7]

On March 15, 1988, President Reagan signed Executive Order 12,630, *"Governmental Actions and Interference With Constitutionally Protected Property Rights."*[8] Executive Order 12,630 draws heavily upon the regulatory coordination function of the Office of Management and Budget established by Executive Order 12291[9] and the Executive Order on federalism. Threads of the environmental assessment process under the National Environmental Policy Act are woven into the fabric of this Order, as are aspects of the budgetary planning process. Executive Order 12,630 reflects thoughtful consideration and vigorous debate throughout the affected government agencies, establishing a practical and workable procedure for implementing the Supreme Court's holdings in *Nollan* and *First English.*

The legitimacy of the Executive Order is premised both upon the duty of the government to respect constitutional protections afforded by the Bill of Rights and upon the management principle that government should not undertake programs without knowing and planning for their potential costs:

> Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.[10]

The Executive Order requires that "[i]n formulating or implementing policies that have takings implications, each Executive department and agency shall be guided" by the principles established in *Nollan* and *First English*. These "general principles," set forth in Section 3 of the Executive Order, include the doctrines of nexus and proportionality established by *Nollan* and the self-actuating right to just compensation set forth in *First English*. Although some actions are exempted from coverage, most traditional government regulatory functions fall within the scope of the Order. The presidential Order singles out permitting processes and the creation of restrictions upon private property use, requiring that all departments and agencies observe the doctrines of nexus and proportionality and that they minimize processing delays.

Perhaps the most challenging of the Order's requirements, however, is the takings implications analysis (or "TIA,") which must be prepared "before undertaking any proposed action regulating private property use for the protection of public health or safety" or for other purposes. When regulations focus on public health and safety purposes, the TIA must identify "with as much specificity as possible" the public health and safety risk created by the proposed private property use, establish that the proposed governmental action "substantially advances the purpose of protecting public health and safety against the specifically identified risk," establish that the proposed restrictions are "not disproportionate" to the landowner's contribution to the overall risk, and "estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking."[11] To encourage thoroughness and candor, the TIA will normally be considered an internal deliberative document not subject to production under the Freedom of Information Act, and, in any event, the Executive Order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person."[12]

Finally, the Order requires that the attorney general promulgate guidelines for the evaluation of risk and the avoidance of unanticipated takings "to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order."[13] This

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[7] President's Legislative and Adminstrative Message to Congress, 24 WEEKLY COMP. PRES. DOC. 91 (Jan. 25, 1988)
[8] Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).
[9] Exec. Order No. 12291, 3 CFR 128 (1981).
[10] Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).
[11] *Id.*
[12] *Id.*
[13] *Id.*

guidance discusses the constitutional principles that *Nollan* and *First English* established and, to some degree, also identified issues on which the Supreme Court had not at that time opined. To avoid obsolescence, the Attorney General was ordered to periodically review and update the guidelines to reflect subsequent clarification of constitutional principles by the Supreme Court. Those guidelines were issued on March 18, 1988.[14] They have not been reviewed or updated since.

III. FINDINGS OF OUR INVESTIGATION

To determine whether the Executive Order process, ostensibly in effect for fifteen years, had reduced government impairment of private property rights, we initially sought government records tabulating just compensation payments for inverse condemnation. We found none. We sought annual reports to the Office of Management and Budget, which agencies are required to file under the Executive Order, summarizing takings judgments entered against those agencies. Again, we found none. We sought records or reports of TIA, required under the Executive Order. We found one prepared by the Environmental Protection Agency in 1990. We sought anecdotal evidence, and learned that many agency officials of this and prior administrations had never even heard of Executive Order 12,630, and were doing nothing to comply with it. Finally, we decided to undertake an examination of court records to at least find out how much court-ordered just compensation had been paid in cases filed after January 1, 1991 (a date after the Executive Order for which a database was available) through August 1, 2003.

Because avoiding unnecessary takings protects both constitutional rights and the public treasury, the Executive Order is an important tool for management of regulatory programs. Adherence to the requirements of the Executive Order should thus result in a sharp decline in non-condemnation takings of private property, and in the amounts of taxpayer money paid out in just compensation for such takings. To determine whether such a decline in takings and just compensation payments had occurred since issuance of the Executive Order, we undertook a review of more than 500 taking suits filed against the federal government since 1991. In brief, our findings were:

- In that time period more than 500 new taking cases have been filed against the federal government in the Court of Federal Claims.
- Of these nearly 400 have been resolved.
- In those cases, the court has awarded $111,966,012.10 in just compensation.
- Approximately 22.4% of the successful cases were awards against the Corps of Engineers.
- Approximately 24.4% of the successful cases were awards against the Department of Interior and the Forest Service.
- Approximately 6.1% of the successful cases were awards against EPA.
- Another 80 cases were dismissed on joint motion of the parties, representing in most cases a settlement the amount of which could not be ascertained but which can be estimated at more than $200 million.
- Federal agencies, including the Corps of Engineers, Department of Interior, Forest Service and EPA, have made almost no effort to avoid unnecessary takings or to provide compensation for unavoidable takings of private property.

Since issuance of the Attorney General's guidelines in 1988, scores of important decisions on private property rights have been handed down by the United States Supreme Court, as well as the United States Court of Appeals for the Federal Circuit and the Court of Federal Claims.

We have provided the Subcommittee with copies of our report, and request that it be included in the record of this hearing. The report is also available at www.yourpropertyrights.org

IV. RECOMMENDATIONS

We urge Congress in the strongest terms to address this massive violation of the Takings Executive Order, and callous disregard for constitutional rights. Our recommendations are:

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[14] U.S. Attorney General, "Guidelines for the Evaluation and Avoidance of Unanticipated Takings (June 30, 1988.).

1. Immediately update the Attorney General's guidelines under the Executive Order to reflect important Supreme Court takings decisions over the past fifteen years, as well as, decisions of the Federal Circuit and Court of Federal Claims.
2. Immediately update the agency guidelines, at least those of the Corps of Engineers, Interior Department, Forest Service (which has none) and EPA (which are not publicly available).
3. Pass legislation making the Executive Order legally enforceable, similar to NEPA, Small Business Regulatory Reform Act, and the Paperwork Reduction Act.

Thank you again for the opportunity to address this important constitutional issue. I would be happy to answer any questions the Subcommittee may have.

Mr. CHABOT. Thank you very much. We appreciate your testimony.

Mr. Echeverria.

STATEMENT JOHN D. ECHEVERRIA, EXECUTIVE DIRECTOR, GEORGETOWN ENVIRONMENTAL LAW AND POLICY INSTITUTE

Mr. ECHEVERRIA. Thank you, Mr. Chairman. I am the Executive Director of the Georgetown Environmental Law and Policy Institute. I appreciate the opportunity to testify today.

The GAO report does a thorough and competent job of addressing the questions which the Committee posed relating to the steps taken by the U.S. Department of Justice and several Federal agencies to carry out Executive Order 12630. Unfortunately, however, the GAO investigation did not address a more fundamental and important question: whether the executive order was fundamentally flawed from its inception and whether it should be simply scrapped today.

In my testimony submitted for the record, I explain why the executive order should be rescinded, and I would like to summarize several of my points.

First, the takings impact assessment process is unworkable in many instances, given that the U.S. Supreme Court has said that takings cases should be decided based on an ad hoc, case-specific analysis. I point out that Mr. Marzulla has actually endorsed this viewpoint in a book he wrote, published in 1997, in which he compared takings impact analysis to taking a "shot in the dark." I note that in making that statement he relied upon a statement by the Deputy Attorney General of Maryland, who referred to their own State assessment process as a waste of time.

Second, the 1988 executive order, rather than an effort to enforce the Constitution, was an attempt to promote an exaggerated and inaccurate version of regulatory takings doctrine. This conclusion is supported by the testimony of Charles Fried, the Solicitor General of the United States under President Reagan, who described the authors of the executive order as promoting a "specific, aggressive, and it seemed to me, quite radical project."

It is also supported by numerous analyses documenting how the executive order departed from established Supreme Court precedent. These include, in particular, a CRS analysis issued on December 19th, 1988, concluding on the one hand that, "the majority of takings principles stated or implied in Executive Order 12630 overestimate the likelihood of a taking", and on the other hand,

"the order does not list most of the factors that cut against the occurrence of a taking."

Because it so badly misstates constitutional law, many observers have concluded, accurately I believe, that the executive order was simply an effort to undermine, through the back door, environmental and other public protections that the proponents of the executive order opposed on public policy grounds.

Another problem the executive order appears to impose is a significant bureaucratic burden on Federal agencies to address a relatively modest fiscal issue. Mr. Marzulla has offered in a report, which I haven't had an opportunity to read, a very extravagant estimate of the size of takings. Certainly, the GAO report figures do not match Mr. Marzulla's estimates. I would note that the number of takings cases being filed in the Court of Claims is actually going down, not going up.

Finally, I want to observe that at least some of those urging this Committee to encourage the Department of Justice to revise its takings guidelines appear to be hoping to use the executive order, once again, to promote an exaggerated, one-sided view of takings law. Let me provide what I think is a vivid illustration.

In their prepared testimonies, both Mr. Marzulla and Professor Eagle argue that updated DOJ guidelines should reference not only Supreme Court cases but lower court cases, such as those of the Court of Federal Claims. Professor Eagle cites in particular one Claims Court decision, in a case called *American Pelagic*, and argues that its holdings should be incorporated directly into updated Department of Justice guidelines. This controversial case, which I believe was incorrectly decided and ignored relevant precedent, involves a takings claim based on a moratorium imposed by Congress on the entry of large factory fishing ships into U.S. fisheries. Professor Eagle fails to acknowledge that the case is being appealed by the Bush Justice Department as we speak.

Beyond that, the Attorney Generals of many coastal States in this country believe the decision poses a severe threat to their longstanding authority to manage fishery resources and, therefore, have taken the highly unusual step of filing a brief in the U.S. Court of Appeals for the Federal Circuit to support the U.S. appeal. These State Attorney Generals include, significantly for the purposes of this hearing, the Attorney General of Ohio and the Attorney General of New York.

The fact that the professor would argue that the Department of Justice should embrace the ruling of a trial court which the Justice Department is appealing, and which a number of States vigorously reject, illustrates that what is going on here today is precisely what was going on when the executive order was first issued, not an effort to enforce the Constitution, not an effort to save the taxpayers' money, but an effort to promote a one-sided, exaggerated and inaccurate version of regulatory takings law.

With the Committee's permission, I would like to submit for the record the brief in the *Pelagic* case, submitted by the Attorney Generals of Ohio, New York, and 13 other States.

Mr. CHABOT. Without objection, so ordered.

Mr. ECHEVERRIA. Thank you very much for the opportunity to testify. I would be happy to respond to any questions.

[The prepared statement of Mr. Echeverria, with attachment, follows:]

PREPARED STATEMENT OF JOHN D. ECHEVERRIA

My name is John D. Echeverria. I am the Executive Director of the Georgetown Environmental Law & Policy Institute. I appreciate the opportunity to testify today in this oversight hearing based on the General Accounting Office's recent report, "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use."

The GAO report does a thorough and competent job of addressing the questions which the Committee posed relating to the steps taken by the U.S. Department of Justice and several federal agencies to carry out Executive Order 12630. Unfortunately, however, the GAO investigation did not address a more fundamental and more important question: whether the Executive Order was fundamentally flawed from its inception. Numerous academic and other commentators have severely criticized the Executive Order. In my judgment, those criticisms remain completely valid today; indeed they may have even greater force today. I submit that the Committee, rather than asking whether the guidelines implementing the Executive Order should be revised, should be asking whether Executive Order 12630 should simply be scrapped.

Federal officials, of course, have an obligation to consider the constitutional implications of their actions. This obligation extends to the Takings Clause, which mandates the payment of compensation, as well as to other provisions of the Constitution, starting with the First Amendment and proceeding through the Bill of Rights. The Executive Order, however, makes the mistake of singling out the Takings Clause for consideration through a type of elaborate bureaucratic process that, so far as I can determine, applies to no other provision of the Constitution, and which is essentially unworkable. Beyond that, for the reasons I discuss below, it does so according to standards that seriously distort the original understanding of the Takings Clause as well as settled Supreme Court precedent.

First, the Executive Order asks executive branch officials to conduct an analysis which, in many instances, is extremely difficult if not impossible to perform in any meaningful or useful fashion. The U.S. Supreme Court has largely rejected the use of clear, bright-line rules in deciding takings cases in favor of a relatively flexible, ad hoc approach. Thus, in one of its latest decisions, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court said that "we have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries,'" *Id.* at 326, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S.1003, 1015 (1992).

Applying this ad hoc approach, even the most knowledgeable and conscientious agency staff has great difficulty determining whether proposed "policies that have takings implications," in the terminology of the Executive Order, actually create a risk of takings liability and what the magnitude of the potential liability might be. Whether a specific government action might result in a taking in any particular circumstance will depend upon a number of factors, such as the nature of the regulatory regime in place when a specific owner purchased a specific property, the actual market values of the property with and without the restriction, and the magnitude of the owner's parcel as a whole. Because these and other relevant inquiries are so site- and owner- specific, it is very difficult, in the abstract, to reach any reliable determinations about whether new rules or policies might generate takings liabilities. Significantly, a primary focus of the Executive Order is broad government policies reflected, for example, in "federal regulations, proposed federal regulations, proposed federal legislation" and so on, in addition to site-specific regulatory decisions.

Importantly, Roger Marzulla of Defenders of Property Rights, reportedly one of the authors of the Executive Order, agrees with this point. In a book he wrote on the property rights issue, Mr. Marzulla (along with co-author Nancie Marzulla) criticized so-called "planning bills," which have been introduced in Congress over the years to codify the Executive Order, or institute other types of takings impact assessment procedures, on the ground that they are unworkable. Mr. Marzulla wrote:

> Planning bills do have a serious weakness, however. As Maryland [Deputy] Attorney General Ralph S. Tyler points out, 'no meaningful analysis can be done' of the liability at stake when so much depends not just 'upon the particular circumstances' of the case, but on the philosophy of the particular

> judge hearing the case. . . . When judges take this *ad hoc* approach to takings law, liability planning becomes a shot in the dark.

Nancie G. Marzulla and Roger J. Marzulla, Property Rights: Understanding Government Takings and Environmental Regulation 174 (1997). If the Executive Order supports "no meaningful analysis," and calls for making "shots in the dark," then it logically follows that the Executive Order fails to deploy limited federal agency resources in a useful or effective fashion.

Given the fact that takings impact assessments under the Executive Order are predecisional documents, and therefore not available for public inspection, it is difficult to assess how the Executive Order has worked in practice. Nonetheless, I find some significance in the fact that, of the ten agency rules which GAO identified in which agencies found significant takings implications, nine were issued under the current Bush administration. Unless the Bush administration is imposing new regulatory constraints which go very far beyond anything issued under the Clinton administration, a possibility which I think we can safely discount, then these data probably reflect the greater ideological predisposition on the part of the Bush administration to identify potential takings in agency rule makings. The fact that the standards in the Executive Order, at least as applied to general agency rules and other policy statements, are apparently so malleable underscores the fact that, in many instances, a reliable, objective estimate of takings liability is virtually impossible under the Executive Order.

This is related to a second primary criticism of the Executive Order, which is that its true purpose was to undermine public health and environmental regulations through the back door by promoting an exaggerated and inaccurate version of regulatory takings doctrine. The most damning testimony on this point comes from Professor Charles Fried of Harvard Law School, who served as Solicitor General of the United States under President Ronald Reagan from 1985 to 1989, during the period when Executive Order 12630 was being developed and promulgated. In his memoirs recounting his professional experiences at the Department of Justice, Professor Fried described the deep interest in the property issue within the department during this period. He wrote:

> [A]ttorney General Meese and his young advisors—many drawn from the ranksof the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.

Charles, Fried, Order and Law 183.

Consistent with this description of the extreme constitutional theories held by some takings advocates within the Department of the Justice at the time, other scholars and other commentators have criticized the Executive Order specifically as an effort, not to state constitutional law, but affirmatively to misstate it. Thus, an exhaustive report issued by the Congressional Research Service issued on December 19, 1988, concluded that "the majority of taking principles stated or implied in Executive Order 12630 overestimate the likelihood of a taking, and that the Order does not list most of the factors that cut against the occurrence of a taking." Another commentator observed that the Executive Order "has little to do with judicial realities in defending governmental actions against private claims," (James M. McElfish, Jr., "The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?, 18 ELR 10474 (1988)), and two other commentators stated that "the document seeks to impose on federal agencies a view of takings law that is well beyond the point reached by the Supreme Court in inverse condemnation." Jerry Jackson and Lyle D. Albaugh, " A Critique of the Takings Executive Order in the Context of Environmental Regulation,"18 ELR 10464 (1988).

Because the Executive Order so severely misstated the law, it was difficult to avoid the conclusion that the true purpose of the Executive Order was not to enforce the Constitution, but rather to attack regulatory protections. On April 2, 1993, a number of prominent law scholars wrote to President Clinton urging him to rescind executive Order 12630. (Copy attached.) They wrote:

> The Executive Order . . . represents a misguided effort to use the specter of government liability under the Fifth Amendment in order to frustrate

> regulatory activity that certain members of the Reagan administration opposed as a matter of policy. Fair minded people can—and certainly do—disagree on the kinds of regulatory programs this nation should adopt to protect public health and safety, environmental quality, and other aspects of the public welfare. But the Order and guidelines [issued by the U.S. Department of Justice] seriously overestimate the likelihood that such regulatory programs would result in a taking based on existing precedent. They therefore inappropriately translate important questions of policy into alleged questions of constitutionality.

See also Jerry Jackson and Lyle D. Albaugh, *supra* ("the Executive Order's true purposes are unstated: to expand the circumstances in which a taking will be considered to have occurred and to 'chill' the agencies from making regulatory decisions that may be construed as takings under existing inverse condemnation law as well as the expanded view of the law reflected in the Executive Order").

It is understandable, of course, that some may disagree with the U.S. Supreme Court's reading of the Takings Clause. But it is also important to emphasize that the Founding Fathers intended for the Takings Clause to have a narrow scope and that the Supreme Court's current takings jurisprudence, if anything, goes beyond the original intent of the drafters of the Bill of Rights. No less an advocate of property rights than Justice Scalia has acknowledged that the Takings Clause was originally understood to apply only to direct expropriations of private property, and not to apply to regulations at all. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,1028 n.15 (1992) ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"). *See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.") The current Supreme Court does not question the existence of the regulatory takings doctrine nor am I questioning the existence of that doctrine. The point is simply that the regulatory takings doctrine has no foundation in the text and original understanding of the Takings Clause, and efforts to exaggerate the meaning of the Takings Clause, such as that reflected in Executive Order 12630, seek to take the law further afield from the Founders' original intentions.

Against this backdrop the question of whether Executive Order 12630 should be updated is troubling. The question seems to assume that if the Executive Order has any problem, it is that the order is out of date. As I have explained, the fundamental problem is that the Executive Order simply misstates the law. The order does not need to be fixed; it needs to be scrapped.

A final problem with the Executive Order is that it appears to impose a significant bureaucratic burden on federal agencies to address a relatively modest fiscal issue. The GAO reports that in the three years it examined, the United States incurred liabilities of approximately $32,000,000, as a result of takings judgments and settlements of takings cases. Over 50% of these liabilities were the result of the settlement of one major case. Most of these liabilities arose from cases that were not subject to the Executive Order process, in part because they predated it. While $32,000,000 over three years is hardly a trivial amount, it is a very small amount compared to the much larger voluntary and involuntary liabilities the United States assumes on a routine basis in the context of a $1 trillion-plus annual budget. It is also a small amount to pay to ensure that important environmental and other programs can go forward consistent with the requirement of the Fifth Amendment. In this connection, it is important to emphasize that the Takings Clause does not prohibit takings, but only requires that the government pay compen-sation for a taking. When public takings liabilities are compensated, both Congress' policy objectives and the Fifth Amendment are vindicated. So long as the public's liabilities under the Takings Clause are limited, as they plainly are, one can logically ask, where's the beef?

It bears emphasis that a large number of regulatory reforms have been adopted in the administration of the federal endangered species act, wetlands, and other regulatory programs since Executive Order 12630 was instituted. Many of these reforms were initiated by the Clinton administration and many have been carried forward and expanded under the Bush administration. In the view of some, these administrative reforms have severely weakened our nation's environmental protections. Others disagree. What would be difficult for anyone to dispute, however, is

that these reforms have made the nation's environmental laws far less burdensome for regulated property owners. As a result, the loudly voiced concerns that were part of the context in which Executive Order 12630 was developed have largely abated. Whatever property-rights protection agenda the Executive Order was intended to serve, it is, at a minimum, less useful and important for serving that purpose today.

Finally, I want to address specifically one of the questions discussed in the GAO report: assuming the Executive Order is worthwhile at all, has the Supreme Court made such "fundamental" changes in the law of takings that the U.S. Department of Justice is under an obligation, under the terms of the Executive Order, to update its guidelines under the Executive Order. In my judgment, the answer to this question is no. In certain minor respects the Court can be viewed as having tinkered with takings law since the Executive Order was issued. If anything, the general trend of the decisions has been to narrow the scope of regulatory takings doctrine. For example, the Court since 1988 has reaffirmed the "parcel as a whole" rule, reaffirmed that a legitimate government action is a precondition for a valid taking claim (demonstrating that the so-called "substantially advance" takings test is not a takings test at all), and reaffirmed that the *Nollan* "essential nexus" test applicable to physical actions is limited to exaction cases. On the other hand, the Court's 1992 decision in *Lucas v. South Carolina Coastal Council*, could have been viewed, at least at one point, as having established a significant new *per se* rule governing certain regulatory takings claims. Subsequent Supreme Court decisions, however, have reduced *Lucas* to insignificance, if they have not effectively overruled it. In sum, there have been no "fundamental changes" in takings law mandating revision of the Attorney General guidelines under the Executive Order. I note that, according to the GAO report, the U.S. Department of Justice agrees with this assessment.

Thank you for the opportunity to testify.

Mr. CHABOT. Thank you.

Our final witness will be Steven Eagle. Mr. Eagle, you're recognized. Professor Eagle.

STATEMENT STEVEN J. EAGLE, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. EAGLE. Thank you, Mr. Chairman.

My name is Steven Eagle. I am a professor at George Mason Law School. I teach and write in the area of property rights and government regulation. I appreciate this opportunity to testify before you. I have submitted a written statement which gives my views in detail.

I would say here, Mr. Chairman, that the GAO study reveals two important problems. The first is that the Attorney General has not complied with his duty to update the mandatory guidelines, to take into account recent Supreme Court developments. Second, the GAO has found little evidence to indicate that the four agencies it surveyed either have substantially complied with the guidelines or, frankly, Mr. Chairman, that they're even particularly interested in doing so. The findings of the GAO report seem to be consistent with the notion that the agencies may just be paying lip service to the requirement of the executive order.

As the Attorney General notes in the guidelines, officials must make decisions informed by general and specific principles of takings case law. As I mentioned in my written statement, there have been a number of significant Supreme Court decisions affecting property rights since the guidelines were promulgated in 1988. Among them, of course, is *Lucas versus South Carolina Coastal Council*, establishing that a complete deprivation of value is a categorical taking. While the Court has more recently made it clear that Lucas is limited to complete deprivations, it's not difficult to envision that a Government action, particularly one affecting the environment, might, as Lucas put it, deny an owner economically

viable use of his land. The Court has not yet defined "economically viable", and Lucas remains a trap for regulators who may not be fully conversant with it.

Likewise, different panels of the Federal Circuit have reached opposite conclusions on whether an owner who does suffer a complete deprivation nevertheless has to display investment-backed expectations. Lucas is clearly a fundamental change.

Of the Court's newest cases, *Palazzolo versus Rhode Island* and *Tahoe-Sierra Preservation Council*, both make it clear that Penn Central covers takings, not only complete takings. These cases clearly allow for a partial takings approach and partial takings damages. I would think that those who, like Professor Echeverria, find this approach novel, and who object to partial regulatory takings, surely would describe this as a fundamental shift.

Brown versus Washington Legal Foundation, which was very recently decided, made headlines for upholding the interest on lawyers' trust accounts, the (IOLTA) programs. However, like *Lucas*, it may be that *Brown* creates a new categorical taking, namely, Government's commandeering intangible property, not for purposes of regulating the owner's behavior but, rather, for benefit to the State. That, too, is fundamental.

The Del Monte Dunes effective enunciation of good faith as a requirement also is fundamental, and I think that permeates both the takings clause and the due process clause.

I could go on with other cases, Mr. Chairman. But I think the Supreme Court decides very few takings cases and they're all important. Furthermore, the DOJ lawyers who litigate these cases presumably are conversant with them. They could update the guidelines at fairly modest cost. The question then is why don't they want to update the guidelines? I think that critics who object to updating the guidelines do so, as Professor Echeverria has been very frank to admit, simply because they don't think the guidelines should exist to begin with.

I think it is incomprehensible to me, Mr. Chairman, how the kind of relatively modest requirements of the executive order, which pale in comparison to the executive apparatus set up to deal with other kinds of individual rights, should be questioned as too expensive. The job of government in large part is to protect the rights of citizens, and whether or not very large amounts of money are taken from the Judgment Fund as a result of suits is only one of the concerns. Protecting the rights of citizens is quite another.

In going through the report, it's amazing to me how many instances show that things weren't done because of "mere passage of time." Well, that doesn't work for me, Mr. Chairman, as an explanation. I think that we should have the guidelines revisited, the guidelines should contain comprehensive guidance, and yes, Mr. Chairman, not only should they refer to the Supreme Court's more recent cases, but they should also give some background, including lower court cases, and I think that lawyers litigating these issues should know about things like *American Pelagic* as well as other cases.

Mr. Chairman, I would be happy to answer any questions.

[The prepared statement of Mr. Eagle follows:]

PREPARED STATEMENT OF STEVEN J. EAGLE

Mr. Chairman, Representative Nadler, and distinguished members of the Subcommittee:

My name is Steven J. Eagle. I am a professor of law at George Mason University, in Arlington, Virginia. I testify today in my individual capacity as a teacher of property and constitutional law. My principal research interest is the study of the interface of private property rights and government regulatory powers. I am the author of a treatise on property rights, entitled *Regulatory Takings* (third edition forthcoming in 2004), and write extensively on takings issues. I also lecture at programs for lawyers and judges and serve as chair of the Land Use and Zoning Committee of the American Bar Association's Section of Real Property, Probate and Trust Law. I thank the subcommittee for giving me this opportunity to appear.

The immediate occasion for the Subcommittee's evaluation of the state of federal agency protections of private property rights is the publication of the report prepared for it by the General Accounting Office on "Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use" (GAO Report).[1] The Subcommittee asked that the GAO review implementation of Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights" (EO, or EO 12630)[2] by the Department of Justice. The Subcommittee also asked that the GAO review compliance with the EO by four governmental agencies, the Department of Agriculture, the U.S. Army Corps of Engineers, the Environmental Protection Agency (EPA), and the Department of the Interior (collectively, the "four agencies").

Unfortunately, Mr. Chairman, the GAO Report provides scant assurance that private property rights are being protected, or that government agencies are using prudent fiscal management. The Department of Justice has not updated its "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" (Guidelines),[3] in spite of significant changes in the Supreme Court's regulatory takings case law during the 15 years following its promulgation. Furthermore, as the GAO's understated subheading put it: "Agencies Report That They Fully Consider the Takings Implications of Their Planned Actions but Provided Little Evidence to Support This Claim."[4]

In my opinion, Mr. Chairman, the Department of Justice has failed to follow the EO's mandate that it update its guidelines to "reflect fundamental changes in takings law occurring as a result of Supreme Court decisions."[5] Also in my view, the failure of the four agencies to provide records indicating compliance compels the promulgation of requirements that agencies undertake all mandated takings implication assessments in writing, preserve these assessments with the permanent records of the determinations that they support, and adequately log their compliance. Finally, Mr. Chairman, I suggest that if the Department of Justice and the four agencies do not demonstrate remediation of these deficiencies within a reasonable period of time, the Subcommittee should consider the introduction of legislation mandating the necessary correctives or even according affected citizens or the public standing to contest the adequacy of takings implication assessments (TIAs) in agency proceedings and courts of law.

THE PURPOSES AND REQUIREMENTS OF EXECUTIVE ORDER 12630

EO 12630 was issued by President Reagan in 1988, and was impelled by the reasons specified in its preamble and in its first section, "Purposes":

> [I]n order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows. . . .[6]
>
> Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and

[1] U.S. General Accounting Office Report 03–1015 (Sept. 19, 2003).
[2] 53 Fed. Reg. 8859 (Mar. 15, 1988).
[3] Mar. 18, 1988, printed at 18 *Envtl. L. Rep.* 35168 (1988).
[4] GAO Report at 16.
[5] EO at § 1(c).
[6] *Id.* at preamble.

> should account in decision-making for those taking that are necessitated by statutory mandate.[7]
>
> The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action.[8]

The EO mandated that the Attorney General promulgate the Guidelines, which were published contemporaneously with it. According to the Guidelines:

> In planning and carrying out federal program policies and actions undertaken by statute and otherwise, government officials have the obligation to be fiscally responsible. In addition, they must respect the constitutional rights of individuals who are affected by those program policies and actions. Accordingly, officials must be aware of and avoid, to the extent possible and consistent with the obligations imposed by law, actions that may inadvertently result in takings. Where such taking risk cannot be wholly avoided, responsible government officials should, to the extent possible and consistent with the obligations imposed by law, minimize the potential financial impact of takings by appropriate planning and implementation. To do this, officials must make decisions informed by the general and specific principles of takings case law.[9]

The provisions of both the EO and Guidelines weave together the twin purposes animating the EO, protection for private property rights and the need for responsible financial planning. Prudent fiscal planning and financial accountability alone do not explain some of the EO's purposes. In issuing EO 12630, the President endeavored to ensure that federal departments and agencies operate "for the Constitution," by giving "due regard for the constitutional protections" accorded property rights.[10] This implies that governmental regulation of property must be solicitous of the Due Process, Just Compensation, and Public Use Clauses of the Fifth Amendment. As Justice William Brennan noted, "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."[11]

Although the Supreme Court has never adequately clarified its takings jurisprudence, for over 75 years Justice Oliver Wendell Holmes admonition has prevailed: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12] As the Court subsequently recognized in *Armstrong v. United States*, the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[13]

The EO's admonition that agencies act "to prevent unnecessary takings" is explained both in terms of avoiding unnecessary expenditures for just compensation and preventing the imposition of unnecessary hardship on citizens.[14] Preservation of the public fisc benefits from accomplishing governmental purposes through alternatives less expensive than condemnation of private property. Avoiding unnecessary hardship refers to the fact that most individuals and businesses do not have their property up for sale at any given moment. They would not accept an unsolicited bid at fair market value, since the moving is both disruptive and expensive. Yet the constitutional measure of "just compensation" is "fair market value."[15] For this reason, "[c]ompensation in the constitutional sense is therefore not full compensation."[16] The willingness of an agency to pay just compensation means only it places a value on the property that exceeds the market price. It does not mean that the agency values the property more than its owner does. In many cases, therefore, the com-

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[7] *Id.* at § 1(b).
[8] *Id.* at § 1(c).
[9] *Id.* at § V.A.5.
[10] *Id.* at preamble and § 1(c).
[11] San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).
[12] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[13] 364 U.S. 40, 49 (1960).
[14] EO at § 1(b).
[15] United States v. 50 Acres of Land, 469 U.S. 24 (1984).
[16] Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

pelled transfer of property from citizen to government may make society the poorer. The EO seeks to avoid such a result where possible.

THE ATTORNEY GENERAL'S GUIDELINES ARE SUBSTANTIALLY OUT OF DATE

The Guidelines is a document of over 13,500 words, which, together with the EO, has as its purpose "to assure that governmental decisionmakers are *fully informed* of any potential takings implications of proposed policies and actions."[17] The EO requires that "The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions." Yet, 15 years after the Guidelines were promulgated, the Department of Justice takes the position that no updating is necessary.[18] The four agencies are evenly split on whether revision of the Guidelines would be helpful, with the EPA and the Army Corps of Engineers responding in the negative and the Departments of Agriculture and the Interior indicating that an update would be helpful to their staffs.[19]

Neither the Department of Justice nor any of the four agencies asserted that revisions of the Guidelines would be harmful. If the even split among the four agencies is at all representative, it would seem that many government departments and agencies would find revisions beneficial. Likewise, given that attorneys in the Department of Justice litigate takings issues on a regular basis, the Guidelines could be redrafted at a modest cost.

The Guidelines explain the Supreme Court's takings case law. In doing so, they make extensive use of cases decided by inferior courts, principally the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Federal Claims (CFC) and its predecessors. By necessity, the Supreme Court makes general pronouncements based on cases presenting particular facts. These dicta are fleshed out in lower court opinions. It is difficult to conceive of a Department of Justice brief in a takings case that would cite only Supreme Court holdings and not refer to Federal Circuit and CFC cases applying those holdings in varied factual contexts.

Even were the Department of Justice correct in asserting that Supreme Court precedent has not fundamentally changed, there would be a need to update the Guidelines. When the Guidelines were crafted in 1988, the Attorney General deemed a moderately detailed and nuanced presentation necessary to comport with the EO's mandate. Such a presentation remains necessary now. If there are reasons why the precedent of moderate detail and incorporation of lower court cases now is unsound, it is incumbent upon the Attorney General to elucidate them.

However, the fact is that there have been fundamental changes in the Supreme Court's takings doctrine since the Guidelines went into effect.

ANALYSES OF SPECIFIC SUPREME COURT DECISIONS

The following analyses do not purport to be comprehensive. I attempt only to illustrate some of the principal changes in Supreme Court takings jurisprudence since 1988 that necessitate revisions of the Guidelines.

- *Penn Central Transportation Co. v. City of New York* (1978).[20] *Penn Central* is the source of the Court's principal regulatory takings test. It referred to regulatory takings determinations as "essentially ad hoc, factual inquiries," in which "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[21]

The Court's recent reaffirmation of the primary role of *Penn Central* emphatically does not mean that there have been no fundamental changes in the Supreme Court's takings jurisprudence. *Penn Central* is extraordinarily amorphous, and subsequent cases impose important limitations and qualifications upon it that will prove outcome determinative in some cases and vital for agencies to understand in many more. Some of these qualifications will be noted in the following discussions of post-1988 cases.

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[17] Guidelines at § I.A. (emphasis added).
[18] GAO Report at 9.
[19] *Id.*
[20] 438 U.S. 104 (1978).
[21] *Id.* at 124.

- *Lucas v. South Carolina Coastal Council* (1992).[22] *Lucas* established that a government regulation depriving an owner of all viable economic use of his or her property is a categorical taking, "without case-specific inquiry into the public interest advanced in support of the restraint" under *Penn Central*.[23] The Court recently has made it clear that the retention of even relatively small remaining interests by owners exclude them from the benefit of the *Lucas* rule.[24] Likewise, retention of the right to enjoyment following even a substantial moratorium on use is inconsistent with the total deprivation envisioned by *Lucas*.[25] Nevertheless, *Lucas* is controlling where there is complete and permanent deprivation of use. It should be noted that two panels of the Federal Circuit have reached conflicting judgments as to whether owners invoking *Lucas* must meet the *Penn Central* investment-backed expectations in the uses they assert.[26]
- *Dolan v. City of Tigard* (1994).[27] The Court in *Dolan* established that a government entity demanding an exaction of property in exchange for granting development approval must demonstrate a "rough proportionality" between the exaction and the problems created by the proposed development. The government would have the burden of coming forward with evidence that it had made an "individualized determination" of the need. However, *Dolan* purported to apply to "adjudicative" decisions involving individual parcels and not to "legislative determinations classifying entire areas of the city."[28] The Court subsequently refused to consider why takings principles should be different depending upon whether the injury to the property owner resulted from an "adjudicative" or "legislative" determination.[29] It also stated that the Dolan rough proportionality test is "inapposite" to cases involving denials of development instead of exactions.[30]
- *Suitum v. Tahoe Regional Planning Agency* (1997).[31] *Suitum* considered the "ripeness" for adjudication of an alleged regulatory taking resulting from an agency determination that the petitioner be forbidden to build upon her lot in the foothills above the lake, and given transferable development rights (TDRs) in mitigation. The agency insisted that the claim was not ripe for judicial review until the TDRs were sold, but the Court held that the TDRs could be appraised in the same manner as other assets. *Suitum* also described its regulatory takings ripeness test as "prudential," presumably as distinguished from its being constitutionally required.[32] While "ripeness" is an immensely vexing issue respecting challenges in federal court to alleged state regulatory takings,[33] *Suitum* is useful in analyzing whether federal agency determinations are ripe for judicial review and supports the practical approach to ripeness later expanded upon in *Palazzolo*.[34]
- *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999).[35] This case provides that a federal district court may refer to a jury the questions of whether there has been a taking and whether a governmental entity has accorded the property owner due process of law in applying its own regulations. *Del Monte Dunes* was the first case in which the Court upheld an award of regulatory takings damages. An important subtext is Court's almost palpable view-expressed in its adoption of the petitioner's view of the facts-that the city's repeated refusals to approve development plans satisfying all of its prior objec-

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[22] 505 U.S. 1003, 1015 (1992).

[23] *Id.* at 1015.

[24] Palazzolo v. Rhode Island, 533 U.S. 606 (2001). "Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" *Id.* at 631.

[25] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[26] Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (yes); Palm Beach Isles Assocs v. United States, 231 F.3d 1354, *reh'g in banc denied*, 231 F.3d 1365 (Fed. Cir. 2000) (no).

[27] 512 U.S. 374 (1994).

[28] *Id.* at 385.

[29] Parking Ass'n of Georgia, Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting).

[30] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999).

[31] 520 U.S. 725 (1997).

[32] *Id.* at 733.

[33] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). See John J. Delaney & Duane J. Desiderio, "Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse," 31 *Urb. Law.* 195 (1999).

[34] *Suitum*, 520 U.S., at 740–743.

[35] 526 U.S. 687 (1999).

tions was pretextual. Del Monte Dunes thus imports to takings law a good faith doctrine. It is vital that government agencies be aware of it and it should be adumbrated in Guidelines revisions. Furthermore, the Solicitor General's office made repeated and strong attempts in *Del Monte Dunes* to get the Court to review its Agins "substantially advance a legitimate governmental purpose" doctrine, asserting that the concept is associated with substantive due process and is not a legitimate takings test. The Court declined to act.[36]

- *Palazzolo v. Rhode Island* (2001).[37] *Palazzolo* rejects the strong form of the regulatory takings notice rule. In Lucas, the Court excepted, from its holding that the complete deprivation of viable economic use constitutes a taking, the deprivation of uses to which the owner did not have an existing right under "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[38] The Court refused to adopt Rhode Island's view that the purchase of land subsequent to the promulgation of environmental regulations precluded the owner from challenging those regulations under the Takings Clause. "[A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. . . . A law does not become a background principle for subsequent owners by enactment itself."[39] However, *Palazzolo* does provide some undefined role for the notice rule. The concurring opinion of Justice Sandra Day O'Connor, whose vote was necessary for the Court's majority, stated that "[t]he temptation to adopt what amount to *per se* rules in either direction must be resisted," and that the significance of preacquisition regulations must be determined by application of the *Penn Central* multifactor test.

Palazzolo also indicated that the Court will employ a common sense standard as to when agency determinations are sufficiently well settled as to be "ripe" for judicial review. The Court noted that here, its prior decisions "make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands. . . . Further permit applications were not necessary to establish this point.[40]

Finally, the Court refused to consider the owner's "relevant parcel" claim, since it had not been properly raised below. *Palazzolo* was remanded to the state courts for consideration of the landowner's *Penn Central* partial takings claim.

- *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002)[41]

In order to preserve the clarity of Lake Tahoe, moratoria have been imposed precluding development of the landowners' parcels in the foothills surrounding the lake from 1981 through the present day. However, for procedural reasons, the Court considered only two moratoria in force during a 32-month period in 1981–1984. Likewise for procedural reasons, the petitioners brought only a *Lucas* claim, alleging that the ordinances, on their face, constituted a complete deprivation of property. They did not claim that the ordinances, as applied to them, constituted a partial taking under *Penn Central*. The Court refused to apply the *Lucas* rule to the 32-month period in which the petitioners had suffered a total deprivation, but rather held that the multifactor *Penn Central* test was appropriate, since the temporary deprivation should be considered in the context of the owners' use rights after the expiration of the moratoria along with other facts and circumstances.

The Court discussed "seven theories" under which a court might conclude that a temporary development moratorium might constitute a compensable taking. It noted that four of those were unavailable for procedural reasons. These included the arguments that ostensibly separate moratoria constituted one "rolling" moratorium, that the agency acted in bad faith under *Del Monte Dunes*, that the regulation did not advance a substantial state interest under *Agins*, and that fairness and justice would require compensation in light of the facts of the case under *Penn Central*. Notably, the Court added: "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."[42]

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[36] Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* Steven J. Eagle, "*Del Monte Dunes*, Good Faith, and Land Use Regulation," 30 *Envtl. L. Rep.* 10100, 10107 (2000).
[37] 533 U.S. 606 (2001).
[38] *Lucas*, 505 U.S. at 1029.
[39] *Palazzolo*, 533 U.S. at 629–630.
[40] *Id.* at 621.
[41] 535 U.S. 302 (2002).
[42] *Id.* at 341.

- *Brown v. Legal Foundation of Washington* (2003).[43] In *Brown*, the Court upheld a state "interest on lawyers' trust accounts" (IOLTA) program, under which lawyers were required to deposit client funds in bank accounts in which interest generated would benefit state designated legal services organizations. Not included in the IOLTA requirement were client funds that were capable of generating "net interest" after expenses were they deposited in separate bank accounts in the clients' names. While the Court affirmed that interest generated by clients' funds in the IOLTA accounts belonged to those clients,[44] it reasoned that the inability of the small or short-term balances to generate "net interest" apart from the IOLTA program resulted in no taking. Of particular interest for present purposes is that the Court's agreement "that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central's* ad hoc analysis."[45] The key was that the state was taking the interest for its own use rather than regulating the owner's use of it. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[46]

Brown is a new refinement of the distinction between *Lucas* categorical takings and *Penn Central* partial takings, and will have many applications in takings law.

ANALYSIS OF SPECIFIC TOPICS

- The Role of Partial Regulatory Takings.

Supporters of expanded governmental regulation over private property rights might argue that the reaffirmation of *Penn Central* in *Palazzolo* and *Tahoe-Sierra* indicates no fundamental change in the Supreme Court's post-EO regulatory takings jurisprudence. Yet it is clear that *Palazzolo* and *Tahoe-Sierra* support the understanding that *Penn Central* affirmatively provides for partial regulatory takings-a concept that some who might deny the existence of substantial change are unwilling to read into *Penn Central* itself.

> In *Palazzolo*, the Court stated, far more clearly than it had in any prior case, that even if a regulation does not eliminate "all economically beneficial use," and therefore does not result in a taking under *Lucas*, the regulation may still result in a regulatory taking under *Penn Central*. Prior to *Palazzolo,* some lower courts had applied one basic standard: that a regulation results in a taking if it eliminates essentially all of a property's value. *Palazzolo* conflicts with this approach by distinguishing between *Lucas* "total taking" claims and *Penn Central* claims. *Palazzolo* strongly suggests, though it does not decide the issue, that the evidence that Palazzolo's property retained a value of $200,000 was not sufficient, by itself, to defeat the *Penn Central* taking claim.
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> While *Palazzolo* clearly recognizes the existence of the *so-called Penn Central test*, the Court has not defined with any precision the scope of this type of taking claim or the standards governing its application. If, as discussed above, preacquisition notice must be a relevant factor in both a *Lucas* case and a *Penn Central* case, the differences between these two categories of takings may turn out to be rather slight. In any event, by providing new support for the *Penn Central* test, *Palazzolo* will generate *many new questions* about this test and how it should be applied.[47]

- Determining the Relevant Parcel.

Penn Central said that courts analyzing regulatory takings cases should consider the "parcel as a whole."[48] Lucas noted that ascertaining the relevant parcel was a "difficult question,"[49] and *Palazzolo* seemed to call for the rule's reexamination.[50] One year later, *Tahoe-Sierra* endorsed the *Penn Central* parcel as a whole concept.[51] Nevertheless, during the period between *Penn Central* and *Tahoe-Sierra* the lower

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[43] 123 S.Ct. 1406 (2003).
[44] Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).
[45] *Brown*, 123 S.Ct. at 1419.
[46] *Id.* at 1418 (quoting United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951).
[47] John D. Echeverria, "A Preliminary Assessment of *Palazzolo v. Rhode Island*," 31 *Envtl. L. Rep.* 11112, 11114 (2001) (emphasis added).
[48] *Penn Central*, 438 U.S. at 131.
[49] *Lucas*, 505 U.S. at 1016 n.7.
[50] *Palazzolo*, 533 U.S., at 631 ("Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule. Whatever the merits of these criticisms, we will not explore the point here.") (internal citations omitted).
[51] *Tahoe-Sierra*, 535 U.S. at 327.

courts have considered many factual nuances that go into a relevant parcel determination, examining the circumstances under which the property was acquired and parts of the property sold, the physical nature of the property, and the extent to which parts of the property have been put to coordinated use.[52] Nothing in *Tahoe-Sierra* forecloses future analyses of this nature. Notably, while rejecting the notion of temporal severance of a freehold interest, *Tahoe-Sierra* leaves open the question of where there is a *Lucas* taking when a temporary development moratorium covers the entire remaining duration of a leasehold interest.

In sum, since 1988 the Supreme Court has noted in several cases the complexity of the relevant parcel problem and the lower courts have devised various rules to deal with the problem. These changes mark a significant shift not withstanding the Court's recent affirmation that "parcel as a whole" remains the initial baseline.

• Investment-Backed Expectations,

Both *Palazzolo* and *Tahoe-Sierra* have affirmed the importance of the *Penn Central* "investment-backed expectations" test. Justice O'Connor's pivotal concurrence in *Palazzolo* asserted that the Court's "polestar . . . remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine."[53] *Tahoe-Sierra* seconded this analysis.[54] However, *Palazzolo* cautioned that the state supreme court, the decision of which it was reviewing, "erred in elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations, though important, are not talismanic under Penn Central."[55]

While the Court held in *Palazzolo* that expectations of purchasers are not necessarily bound by preexisting ordinances, it has not ruled on the role that such preacquisition rules should play. It also has not determined whether the expectations of property buyers should be constrained by the "regulatory climate" as well as by regulations in force.[56] Given the plasticity of the expectations concept and the inherent circuity between legal rights based on expectations and expectations based on legal rights, it is crucial that federal agencies receive guidance on this issue that is up to date.

• Character of the Regulation.

As noted earlier, *Penn Central* stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[57] Yet regulation vs. physical invasion was a meaningful *Penn Central* test only for four years, until the Court held that permanent physical invasions constituted categorical *per se* takings.[58] The Supreme Court's new *Brown* IOLTA case, discussed above, drew the distinction between regulations intended to constrain the property owner's conduct and regulations intended to confer a benefit on government.[59]

In *Eastern Enterprises v. Apfel*,[60] decided in 1998, a plurality of the Court found a statute unconstitutional as applied, given its character as imposing "retroactive liability [that] is substantial and particularly far reaching.[61] That Supreme Court cases such as *Eastern Enterprises* (and *Brown*) suggest that new content could be given the *Penn Central* characterization test was brought home in a recent Court of Federal Claims decision involving a very expensive and specialized fishing vessel that was the subject of legislation precluding it, and it alone, from entering service.[62] "The plurality opinion in Eastern Enterprises . . . suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two [non-*Penn Central*] factors are also relevant: (1) whether the action is retroactive in

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[52] *See, e.g.*, Ciampetti v. United States, 18 Cl.Ct. 548 (1989); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed.Cir. 1994); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

[53] *Palazzolo,* 533 U.S. at 633.

[54] *Tahoe-Sierra,* 535 U.S. at 327 n.23.

[55] *Palazzolo,* 533 U.S. at 634 (brackets in original).

[56] Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

[57] 438 U.S., at 124.

[58] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[59] Brown v. Legal Foundation of Washington, 123 S.Ct. 1406, 1418 (2003).

[60] 524 U.S. 498 (1998).

[61] *Id.* at 534.

[62] American Pelagic Fishing Co., L.P., v. United States, 49 Fed.Cl. 36 (2001) (liability); 55 Fed.Cl. 575 (2003) (damages).

effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. Both factors are present here."[63]

These important additions to the meaning of a basic *Penn Central* test should be incorporated in updated Department of Justice Guidelines.

THE GAO HAS BEEN UNABLE TO SECURE EVIDENCE OF COMPLIANCE WITH EO 12630

One of the most troubling aspects of the GAO Report is the fact that the four agencies being reviewed for compliance with EO 12630 did not demonstrate that they take its requirements seriously. This situation should be corrected through better management within the executive branch or by the Congress.

GUIDELINES AND STATISTICS

The GAO Report contains numerous mentions of EO 12630 requirements that are not enforced, of paperwork that is lost, of regulatory processes that apparently wandered off during some passage of time, and of procedures that assertedly were performed but are undocumented.

The Report relates that, although the EO requires annual compilations of just compensation awards, the Office of Management and Budget (OMB) has informed departments and agencies that they need not bother, since such awards are paid by the Treasury's Judgment Fund and not by them.[64] Yet aggregate totals of these awards provide valuable information about the state of private property rights, and the externalization of the cost of awards to the Treasury does not motivate agencies to reduce them. Even for the period before the OMB action, the agencies had difficulty in documenting their submissions "because of the passage of time."[65]

The Attorney General did not issue Supplemental Guidelines for the Department of Agriculture because of substantive disagreements relating to grazing permits on public lands. Beyond that, "Justice and Agriculture officials also indicated that other issues may have been unresolved, but because of passage of time (nearly 10 years) and the purging of older files, they could not identify other possible reasons why Agriculture's guidelines were not completed."[66]

It also is not clear whether categorical exclusions from the TIA process makes potential abuses of property owners' rights difficult or impossible to discern. For instance, when the Department of Justice issued agency specific Supplemental Guidelines for the Army Corps of Engineers and EPA in early 1989 and Interior in 1993, it included categorical exclusions for matters such as nonlegislative actions to which affected owners consented (Interior), and denials "without prejudice," in which owners could reapply (ACE).[67] Given the arduous nature of appeals from agency determinations, "consent" to overreaching might be the logical option for a beleaguered property owner. Likewise, owners might have accepted "non-prejudicial" denials without refilling, rather than demonstrate the futility of continuing to refine and submit applications.

I am not asserting that the four agencies, or others, behaved in such an inappropriate manner. I do suggest, Mr. Chairman, that a sampling by GAO of agency actions excluded from the requirements of EO 12630 might discern whether such abuse exists.

DOCUMENTATION OF INDIVIDUAL ASSESSMENTS.

As might be expected, agencies that had trouble devising rules and compiling aggregate data did not document doing an adequate job in performing individual takings implication assessments (TIAs). According to the GAO, "[t]he four agencies said that they fully consider the potential takings implications of their planned regulatory actions, but provided us with limited documentary evidence to support this claim."[68] "Agencies provided us with a few written examples of takings implication assessments. Agency officials said that these assessments are not always documented in writing, and, because of the passage of time, those assessments that were

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[63] *Id.* at 49 Fed.Cl. 50 (citing *Eastern Enterprises*, 524 U.S. at 532–37).
[64] GAO Report at 14–16.
[65] *Id.* at 15 n.21.
[66] *Id.* at 13 & n.18.
[67] GAO Report at 12–13.
[68] *Id.* at 16.

put in writing may no longer be on file."[69] Even when written assessments are made, they might be expunged from the records.[70]

Even with respect to notices of proposed and final rulemaking appearing in the *Federal Register*, "relatively few" notices mentioned the EO, and most of those contained only a "simple statement that the EO was considered and, in general, that there were no significant takings implications."[71] The GAO analysis of 375 proposed and final rules published in the *Federal Register* found only 50 instances where any sort of TIA was mentioned, and only ten finding significant takings implications.[72]

Analysis of Takings Awards and Settlements

According to information supplied the GAO by the Department of Justice, 44 regulatory takings cases brought against the four agencies were concluded during fiscal years 2000 through 2002. The just compensation awarded by the Court of Federal Claims in two cases totaled $4.2 million. In addition, the Department of Justice settled 12 additional claims, aggregating $32.3 million.[73]

The four agencies informed the GAO that only three of the 14 cases in which just compensation was awarded or a financial settlement made were subject to OE 12630. Of those, only in one case was a TIA performed.[74] While these numbers are too small to be statistically meaningful, they are not comforting.

Possible Solutions to Ineffective Protection of Property Rights Under EO 12630

As my testimony has noted, Mr. Chairman, I believe that the Attorney General has been remiss in not updating the takings analysis of EO 12360, and that the Department of Justice and OMB have failed to put in place procedures to ensure that departments and agencies comport with the requirements of the EO.

Administrative Action

The most direct and cost efficient solution to this problem is for the Department of Justice Guidelines to be rewritten and for it, OMB, and the agencies involved to strengthen their rules. This would entail that TIAs be more detailed than sweeping and generalized statements that policies and decisions have no takings implications. On the other hand, in many situations it probably would not be necessary for individualized determinations to be made with respect to each property owner who potentially would be affected.

The challenge is to create some mechanism within agencies that would ensure fully adequate but not overly burdensome compliance. As a check to ensure that such a mechanism is working properly, the Department of Justice Guidelines and Supplemental Guidelines for individual agencies should provide for (1) written TIAs, agency logs, and aggregate data; (2) the retention of these records by the agencies and the submission of aggregate data to the Justice Department or other monitoring agencies; and (3) the periodic auditing of EO 12630 performance through random sampling and other quality control techniques.

If executive branch agencies cannot effectively mandate these necessary tasks, it might be necessary for the Congress to enact remedial legislation.

Private Rights of Action

EO 12630 provides that it "is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."[75] Thus, claims that an agency violated the EO fail as a matter of law.[76]

If the steps I have outlined above prove unworkable, legislation might be enacted providing standing for either those directly affected by inadequate TIAs, or for citizens generally, to challenge inadequate the process in administrative and judicial

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[69] *Id.* at 17.
[70] *See, id.* (noting that the Corps of Engineers internal policies require that TIAs be removed from the file once the agency has made a permit decision).
[71] *Id.* at 18.
[72] *Id.* at 19.
[73] *Id.* at 20.
[74] *Id.*
[75] EO 12630, § 6.
[76] Duval Ranching Co. v. Glickman, 965 F.Supp. 1427, 1446 (D. Nev. 1997); McKinley v. United States, 828 F.Supp. 888, 893 (D. N.M.1993).

proceedings. This would make the protection of private property rights more directly comparable to the protection of the environment under such statutes as the National Environmental Policy Act (NEPA), which requires federal agencies to assess the environmental consequences of, and alternatives to, their proposed actions and policies,[77] and the environmental laws that provide for citizen enforcement as "private attorneys general" through the filing of federal lawsuits.[78]

I recognize, Mr. Chairman, that some would object to making TIAs available on the grounds that they would give property owners and others a roadmap for suit against the United States. That is one of the reasons why I would reserve the provision of affected owner and citizen suits as a last resort if other measures fail. The object would be not to award damages, but to encourage compliance with constitutionally protected property rights.

CONCLUSION

The subject matter of today's hearing is very important to protecting the rights of American citizens. I commend the Subcommittee for giving property rights, and EO 12630, the attention they deserve.

Mr. CHABOT. Thank you very much, Professor, and thanks to all the witnesses.

I recognize myself for 5 minutes for the purpose of asking questions. First, Ms. Mittal, if I could address you.

What changes to Executive Order 12630 would have made it easier for both GAO and Congress to evaluate the extent to which takings implications are being sufficiently analyzed by Federal agencies, or if they're analyzed at all? In other words, what procedures might make Federal agencies' evaluations of takings implication assessments more transparent to those interested in conducting oversight, like us and you, regarding the extent to which constitutionally protected private property rights are being protected by Federal agencies?

Ms. MITTAL. Just on the basis of the trouble that we had in even obtaining any sort of documentation, there are three or four very simple steps that the agencies could actually implement. I don't know if you would have to change the executive order or the guidelines. You could probably accommodate it either way.

Basically, you know, just requiring that all takings implication assessments be in writing; that would help, so that there's a paper trail. Requiring that they be maintained in some sort of central file or administrative file, so that for oversight purposes somebody could actually get copies of them. Third, you should require the agencies to at least maintain them for a certain period of time.

What we were being told is they're not maintained in the files, they're thrown away, or they're not even put in writing. So these three things would definitely achieve that result. The takings implication assessments would be available, they would be available for review and oversight, and people could actually get copies of them.

The other thing that we would recommend is that the Federal Register notices—those were the things that we tried to look through, 375 of them, and only 50 of them actually indicated that a takings implication assessment was actually done. So maybe specifying the form and content of what a Federal Register notice

[77] *See* National Environmental Policy Act, 42 U.S.C. § 4332 (1994).

[78] *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g)(1) (2000); Clean Water Act, 33 U.S.C. § 1365 (2000); Clean Air Act, 42 U.S.C. § 7604 (2000).

should include, as well as the conclusions of the takings implication assessments, would be very helpful as well.

Mr. CHABOT. Thank you.

Professor Eagle, let me turn to you for a moment. If you had to prioritize the enactment of the various reforms that you have proposed, which do you think should be done first, and why? What's the most important?

Mr. EAGLE. Clearly, Mr. Chairman, I think that Miss Mittal's response is clearly the first step in what should be done. Before the Congress can accurately determine what further remedies are necessary, I would start with the mildest one, which is simply to hold the agencies to show that they've complied with existing regulations. If that fails, Mr. Chairman, I think it's incumbent upon Congress to go further.

Mr. CHABOT. Thank you very much.

Mr. Marzulla, let me turn to you next. Your organization has issued a report in which it found that actions taken by the Army Corps of Engineers and the Department of Interior were particularly likely to result in taxpayer dollars going to pay compensation in takings claims.

What policies or actions within the jurisdiction of the Army Corps of Engineers and the Department of the Interior might explain that situation?

Mr. MARZULLA. Mr. Chairman, the wetlands program accounts for a very large proportion of the cases which have been brought and concluded, as well as the mining program and several other of the land management programs administered both by the Department of Interior and the Forest Service of the Department of Agriculture.

We therefore believe that, in addition to updating the Attorney General's guidelines, that the individual guidelines for those agencies must be revisited. Clearly they are not working. Every time a judgment is entered against the United States for failure to pay just compensation for property taken, the court is making a finding that this Government has not complied with its constitutional duty, that the system is broken. Therefore, updating those regulations, updating those guidelines, and requiring the takings implication assessments to be done will obviously tend to minimize the number of instances in which takings occur in which just compensation has to be paid, and in which citizens have to sue their Government in order to obtain their constitutional right.

Mr. CHABOT. Thank you very much.

Let me follow up with one more question quickly here. In what sense do final court awards of just compensation represent only the tip of the iceberg regarding the extent to which Federal taxpayers are made to make payments for takings by Federal agencies, and the extent to which private property is taken without just compensation?

Mr. MARZULLA. Mr. Chairman, it is a very arduous process to obtain just compensation from the Federal Government. There is no procedure whereby an individual can go to an agency and request just compensation, in large part because the just compensation doesn't come out of an agency budget.

Why would the Corps of Engineers hand over millions of dollars to an individual, rather than say, "Go sue the United States, the Justice Department will defend us for free. They've got all their lawyers over there, and if at the end of the day judgment is entered, not only does it get paid out of the Judgment Fund, but we don't even have to report it to OMB or anyone else. Even Congress doesn't know that money has been paid out because we disregarded the Constitution."

So the requirement is clearly that the guidelines be updated, that the executive order be complied with, and we think that 15 years of noncompliance suggests that a statute is necessary to make sure that gets done.

Mr. CHABOT. Thank you very much.

My time has expired. The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you.

Professor Echeverria, if I'm pronouncing it correctly——

Mr. ECHEVERRIA. Yes.

Mr. NADLER. Good. You have been sitting there listening to these rather radical views for the last few minutes, taking notes. Could you just give us your thoughts on what you've heard from the last two speakers?

Mr. ECHEVERRIA. Certainly. Thank you, Congressman Nadler.

I was struck by Steven Eagle's presentation purporting to establish that the Supreme Court has issued a series of decisions working a fundamental change in constitutional law. One point that hasn't been brought out yet is the Department of Justice, as reported in the GAO report, has taken the position that there have been no fundamental changes in constitutional law warranting any revisions of the executive order, in accordance with the requirements of the executive order.

Mr. NADLER. They have made that affirmative finding.

Mr. ECHEVERRIA. They made the affirmative statement to GAO, that in their view——

Mr. NADLER. The Ashcroft-Bush Justice Department.

Mr. ECHEVERRIA. Yes.

Mr. NADLER. Thank you.

Mr. ECHEVERRIA. My own review of the Supreme Court decision confirms that. The Supreme Court has not made any fundamental changes.

If there is one decision I would point to, that at one point in time might have led some people to say the Supreme Court is really going in a different direction, it would be the 1992 Supreme Court decision in *Lucas versus South Carolina Coastal Council.*

What I think is clear, though, from the subsequent Supreme Court decisions, particularly the *Tahoe-Sierra* decision and the *Palazzolo* decision, *Lucas* applies to a very small, if not infinitesimal category of cases. *Lucas* does not work a fundamental change, and that the Penn Central analysis, which has been in place since the 1970's, is the governing law of takings.

To the extent that Professor Eagle finds innovations in the law, it seems to me, just as he has with the *Pelagic* case, he is cherry-picking the law at the Supreme Court level, just as he did at the Court of Claims level, to find dictum and extraneous statements to

support his view that the takings clause should be read more broadly than the Supreme Court.

I think we should rely on the judgment of the Department of Justice, that there have been no fundamental changes warranting a change in the guidelines.

I guess the other point I wanted to emphasize is that the takings clause does not prohibit the Government from acting. The takings clause simply requires that the Government pay compensation as a condition of the Government going forward. So contrary to the view presented by Mr. Marzulla, one can view the cases in which the Government has protected a wetland, or taken some other action for public benefit, and has been required to pay compensation, as fulfilling two important objectives: one is fulfilling the objective of Congress in enacting a statute, and in vindicating the right to compensation provided under the Fifth Amendment.

The Court of Claims is a court, not an administrative agency. But as Roger and I both know, having participated in the Court of Claims conference the day before yesterday, it is the people's court. It is a very friendly court, it operates on a nationwide basis, it holds hearings close to the homes of the claimants and to the property at issue in the cases, it's procedures are very user friendly, and when compensation is warranted, that court is available to provide it.

Mr. NADLER. Thank you very much.

Ms. Mittal, the study that Mr. Marzulla describes in his testimony sounds very different from the findings in your study. Did you compare notes with him? Have you had a chance to assess his claims? How do you assess what he said about your study, or how he characterized your study?

Ms. MITTAL. We just received Mr. Marzulla's study yesterday and we have not had the opportunity to look at his results in great detail and compare them to ours. So at this point I couldn't answer that question.

Mr. NADLER. I would note that we haven't seen it at all yet.

Second, Ms. Mittal, did any person in the agency that you studied indicate to you that they were not sure what the law required of them because the guidance has not been revised? Do the agency general counsels do their own research or do they rely on DOJ guidance, and is that guidance not specific enough according to the people in the agencies? Have you gotten such complaints?

Ms. MITTAL. We didn't get any complaints, per se. I mean, the guidelines are a starting point. All of the agency counsels agreed that they provide a general framework for doing a takings implication assessment and, therefore, all of the counsels are doing their own legal research to support whatever issue they're dealing with.

However, you know, the fact remains that two agencies are telling us, Agriculture and Interior, that it would be very helpful for their staff who do this research if the guidelines were updated.

Mr. NADLER. Did anyone say to you that, because the guidelines aren't specific enough, or had not been updated, that they thought they made a mistake in ruling?

Ms. MITTAL. No, no one said that specifically to us.

Mr. NADLER. Thank you very much.

Mr. CHABOT. The gentleman's time has expired. The gentleman is free to make his 11 o'clock meeting, if he chooses, at whatever point.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

I guess my interests are a little bit more pragmatic because of the area that I represent, southeast Virginia, where wetlands are a very serious consideration in any kind of land development. We have had complaints from a lot of developers, and I think legitimate complaints, that they can't tell from 1 minute to the next what they can do with their property and what they can't. So let me just get a general idea from the witnesses.

What is the status of a person's entitlement to compensation if they try to build on something that didn't look like wetlands but turns out to be wetlands and they can't build; are they entitled to anything under the takings theory?

Mr. ECHEVERRIA. I'll take a quick stab at it.

The first point to make, I think, is they are likely not to be blocked from getting permission to fill the wetlands. One of the points highlighted in the GAO report is that some 99.9 percent of the applications to the Army Corps of Engineers for fill permits are granted. So——

Mr. SCOTT. Not in my area. I'm sorry, but not in southeast Virginia. But go ahead.

Mr. ECHEVERRIA. Well, then there must be some areas of the country where 100 percent of the permits are granted. There must be many regions of the country where 100 percent of the permits are granted, because those figures cited in the GAO report are consistent with the historical numbers.

The second point is that, generally speaking, the answer to the question of whether or not there will be a taking, the answer is likely to be no, because the Supreme Court has said that a taking is going to arise only when a regulation eliminates all or substantially all the value of the property.

The Court has also affirmed that in evaluating that question, the courts must apply the so-called "parcel as a whole" rule. So if an individual owns 100 acres of land, and they've got one acre of wetland, and the Army Corps of Engineers says that serves an important flood control function as well as other public functions, and we decline to grant you permission to fill that, that kind of burden will not rise to the level of a constitutional taking under established standards.

Mr. SCOTT. But if all you own is the one acre, and they say you can't build at all, then what? Are you entitled to anything?

Mr. ECHEVERRIA. Then you have a—depending on some other circumstances, you would have a strong takings claim in that situation.

Mr. SCOTT. One of the problems we've had is trying to get a map to show you what you can do and what you can't do. These maps change. You get one who pays $50,000 and one guy does a map, and somebody else comes right behind and there's another map. The water didn't change. I mean, it's just the map changed.

Are you entitled to any compensation if somebody comes back and says, "Well, what you thought you could do and the map you had when you purchased the property has changed, and where you thought you could build, now you can't." Is that a situation for which you would be entitled to compensation?

Mr. MARZULLA. Congressman, may I address that question? The answer is, I hope so.

We have a case going to trial in the Court of Federal Claims on December 1st in which precisely that sequence occurred. That is, the Corps of Engineers did a delineation of the property on the basis of which the developer then purchased the property, knowing he could develop it.

The Corps then said, "We made a mistake. Sorry. We're going to go out there and redelineate your property, and if we find that it is wetlands, and now you can't develop it as you intended to do. You have to give about 200 acres of your property over to the public as mitigation for being allowed to actually use your property." We will find out from the Court of Federal Claims.

However, let me suggest that I would differ with Mr. Echeverria, the suggestion that everybody gets to fill all the wetlands and so there really isn't a problem out there. A disproportionate number of the takings decisions against the Federal Government arise from wetland permit denials. We could provide the Committee with a list of those cases.

One of the most difficult things for property owners to deal with is precisely the situation that you mentioned. For example, the recent decision by a number of Corps districts—not all of them, I might add. What's a wetland in one place isn't a wetland somewhere else.

The recent decision that if you have a man-made ditch, be it a roadside drainage ditch or whatever, and that ditch runs through perhaps miles and miles of private property, and culverts and pipes and so forth, but eventually empties into a tributary, to a navigable water that, in fact, the property adjacent to that man-made drainage ditch is a wetland under the jurisdiction of the Corps of Engineers, that's an issue that's going to make its way to the Supreme Court in the next year or two.

Mr. CHABOT. The gentleman's time has expired. Would he like an additional 2 minutes?

Mr. SCOTT. Yes, please.

Mr. CHABOT. Okay. The gentleman is recognized for an additional 2 minutes.

Mr. SCOTT. I think the concern that I have is certainty in whether you can build. If you can't build, just let me know before I have invested $50,000 in maps and all that kind of stuff.

Is there anything in these executive orders, now or proposed, that would help in that certainty?

Mr. MARZULLA. A takings implication analysis should be done, Congressman, prior to either denying the permit or placing a condition upon the permit which would make it economically infeasible to build. So the answer is yes.

Mr. SCOTT. Some of that is a little after the fact, because you would like to know that when you purchase the property, whether or not, as in your situation, whether or not you can build on it. You

would like to have some certainty and you don't like the map to change and have to spend $50,000 to get a new map, and then stay in court and argue about which map is the map.

Is there anything in these executive orders, now or proposed, that can help in the certainty that you will be able to do or not do what you want to do?

Mr. MARZULLA. To the extent that the Corps of Engineers changes its definition of what is a wetland, its methodology for determining what is a wetland, that change of policy should be subject to a takings implication assessment.

Mr. SCOTT. Is it? Is that the law now?

Mr. MARZULLA. That is what the executive order requires. If you're asking me does the Corps do it? I would guess no.

Mr. SCOTT. So if the Government changes its policy and, therefore, it means that three-fourths of your land is now no longer possible for development, then that would be a takings because there has been a change in policy? Is that right?

Mr. MARZULLA. Yes. If there is a change in policy it's depending on the facts. Obviously, as Mr. Echeverria points out, the facts of each case have to be considered. But the facts that you just stated, that is, a change in policy which says it wasn't a wetland today, we're going to call it a wetland because we've changed the way we define wetland, that would certainly indicate a taking and I would think that would be a case worth looking into.

Mr. CHABOT. The gentleman's additional time has expired. But it looks like we have two more gentleman that would like to address that, so we'll let them both briefly comment, starting with Mr. Echeverria, and then Mr. Eagle.

Mr. SCOTT. I appreciate it, Mr. Chairman. Thank you.

Mr. ECHEVERRIA. Mr. Scott, I think your question really highlights why this executive order is largely unworkable. It doesn't address the issues that you raise.

It is certainly a legitimate question whether or not landowners know where wetlands are and where they are not. That issue needs to be addressed to the Army Corps of Engineers in terms of their procedures for delineating wetlands.

But trying to address that through a takings impact assessment doesn't get you anywhere because, for example, if the Army Corps of Engineers says the on presence of such and such a kind of vegetation, or certain kinds of soils, we're going to decide that that does or does not indicate the presence of wetlands, that's kind of a scientific determination, a technical determination that they will make at a general level in relation to the entire Nation or entire State. And then the question might be, how would that affect individual landowners.

What Mr. Marzulla suggests is that the agency could do a takings impact analysis and say well, if we're going to define the presence of this kind of vegetation as indicative of wetlands, can we make any reasonable conclusions as to whether or not there are likely to be takings?

The answer is no. One cannot make any reasonable determinations because you're not going to know the circumstances of all the different landowners who might be affected, how many acres are involved, how many more wetlands acres or fewer wetlands acres

will be involved, how much land the landowners own, all the different circumstances of the individual landowners.

So in order to get at the question you're raising, which I think is a very legitimate one, one does not want to waste agency resources in doing these kind of abstract, legal analyses of potential takings implications of broad policy changes.

Mr. CHABOT. We'll conclude with Professor Eagle.

Mr. EAGLE. Mr. Chairman, I think that Mr. Scott's constituents are perfectly right to think that they should be bewildered because of the inconclusive state of the law. Indeed, one of the anomalous things I find about those who object to Supreme Court cases not being deemed fundamental is that they at the same time maintain the only Supreme Court standard is one that is so totally amorphous that one can hardly glean any rules out of it at all. Therefore, we're left totally in the dark.

For instance, even if one of Mr. Scott's constituents owns land, and at the time he acquired the land there was no regulation against development, and later on, even if the land would be completely deprived of all value, if there is a denial of a permit, there is case law in the Federal Circuit suggesting that that landowner at the time of purchase would have been responsible not only for knowing what the law was that could have precluded his development, but also for knowing what the "regulatory climate" was, what law not only exists but might exist in the future.

That's precisely the situation that I think impels the Department of Justice to give as much detail, as much information about the subsequent Supreme Court decisions and lower court interpretations of those to give as effective guidance to policy administrators and regulators on the ground as possible.

Mr. CHABOT. Thank you very much, Professor. The gentleman's time has expired.

Without objection, I would submit for the record citations to three law review articles discussing the original understanding of the takings clause as including regulatory takings.

[The information referred to follows in the Appendix]

Mr. CHABOT. The gentleman from Virginia is recognized for the purpose of making a motion.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that all Members have five legislative days in which to revise and extend their remarks, and to submit additional materials for inclusion in the record, and submit additional questions to the witnesses for responses in writing for the record.

Mr. CHABOT. Without objection, so ordered.

I would like to again thank the panel for their testimony here this morning. We appreciate it very much.

If there is no further business to come before the Committee, we are adjourned.

[Whereupon, at 11:13 a.m., the Subcommittee adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Submission for the Record of Chairman Chabot

I would like to submit for the record citations to three law review articles discussing the original understanding of the Takings Clause as including regulatory takings:

1. Andrew S. Gold, "Regulatory Takings and Original Intent: The Direct, Physical Takings Theses 'Goes Too Far,'" 49 Am.U.L.Rev. 181 (1999).

2. Eric R. Claeys, "Takings, Regulations, and Natural Property Rights," 88 Cornell L.Rev. 1549 (2003).

3. Douglas W. Kmiec, "The Original Understanding of the Takings Clause Is Neither Weak Not Obtuse," 88 Colum.L.Rev. 1630 (1988).

MATERIAL SUBMITTED BY MR. MARZULLA

SPECIAL REPORT

EXECUTIVE ORDER 12,630: WHY THE TAKINGS EXECUTIVE ORDER NEEDS TO BE UPDATED

Defenders of Property Rights

Executive Order 12,630:
Why the Takings Executive Order
Needs to be Updated

EXECUTIVE SUMMARY: GOVERNMENT HAS IGNORED THE TAKINGS EXECUTIVE ORDER

Because avoiding unnecessary takings protects both constitutional rights and the public treasury, the Executive Order is an important tool for management of regulatory programs. Adherence to the requirements of the Executive Order should thus result in a sharp decline in non-condemnation takings of private property, and in the amounts of taxpayer money paid out in just compensation for such takings. To determine whether such a decline in takings and just compensation payments had occurred since issuance of the Executive Order, we undertook a review of more than 500 taking suits filed against the federal government since 1991. In brief, our findings were:

- In that time period more than 500 new taking cases have been filed against the federal government in the Court of Federal Claims.
- Of these nearly 400 have been resolved.
- In those cases, the court has awarded $111,966,012.10 in just compensation.
- Approximately 22.4% of the successful cases were awards against the Corps of Engineers.
- Approximately 24.4% of the successful cases were awards against the Department of Interior and the Forest Service.
- Approximately 6.1% of the successful cases were awards against EPA.
- Another 80 cases were dismissed on joint motion of the parties, representing in most cases a settlement the amount of which could not be ascertained but which can be estimated at more than $200 million.
- Federal agencies, including the Corps of Engineers, Department of Interior, Forest Service and EPA, have made almost no effort to avoid unnecessary takings or to provide compensation for unavoidable takings of private property.

We conclude that more faithful adherence to the Executive Order is required.

Our recommendations are:

1. Immediately update the Attorney General's guidelines under the Executive Order to reflect important Supreme Court takings decisions over the past fifteen years, as well as, decisions of the Federal Circuit and Court of Federal Claims.

2. Immediately update the agency guidelines, at least those of the Corps of Engineers, Interior Department, Forest Service (which has none) and EPA (which are not publicly available).

3. Pass legislation making the Executive Order legally enforceable, similar to NEPA, Small Business Regulatory Reform Act, and the Paperwork Reduction Act.

A detailed discussion of these findings follows.

> **Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.**

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

> **The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.**

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

INTRODUCTION

On June 9, 1987, the United States Supreme Court decided the most important property rights case of the twentieth century, *First English Evangelical Lutheran Church v. County of Los Angeles*.[1] Reversing a holding of the California Supreme Court, the United States Supreme Court held that a county flood ordinance which prohibited virtually all construction constituted a "taking" within the meaning of the Fifth Amendment, entitling the landowner to just compensation for the property taken. Echoing the principle enunciated by Justice Holmes 65 years earlier in the *Pennsylvania Coal Co. v. Mahon*[2] decision, the court stated:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies. . . . But such consequences necessarily flow from any decision upholding a claim of a constitutional right; many provisions of the Constitution are designed to limit the flexibility and freedom of

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[1] 482 U.S. 304, 321 (1987).
[2] 260 U.S. 393 (1922).

governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them.[3]

Three weeks after the *First English* decision, the Supreme Court handed down a second landmark regulatory takings case, *Nollan v. California Coastal Commission,*[4] holding that a permit to allow construction of a home adjacent to the ocean could not be conditioned upon the requirement that the landowner relinquish to the public an easement for access over his private beach. Noting that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" the Court declared that "[h]ad California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."[5] The crucial question before the Court was whether the state's police power authority to regulate (and possibly forbid) construction along its coast could be used to pry the easement away from the property owners in return for permission to construct the new home. Admitting that an unbroken stretch of public beach along the California coast might be "a good idea," the Court found uncompensated taking of the easement to fall short of constitutional requirements: "California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollans' property, it must pay for it."[6]

The *First English* and *Nollan* cases sent a shock wave through the federal government, where new and far-reaching regulatory programs such as Superfund,[7] the Clean Water Act,[8] and the Endangered Species Act[9]—all good ideas—could now not be implemented without paying for the private property rights taken in the process. Former United States Attorney General Edwin Meese III was among the first to realize that the

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[3] *Id.* at 321.
[4] 483 U.S. 825 (1987).
[5] *Id.* at 831.
[6] *Id.* at 841, 42.
[7] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2003).
[8] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (2003).
[9] 16 U.S.C. §§ 1531 et seq. (2003).

government lacked any plan for avoiding unnecessary regulatory takings, or for paying those whose property had been taken by regulation. His concerns quickly reached the White House and the Office of Management and Budget (OMB)—and the President.

Accordingly, in his legislative and administrative message to the Congress of January 25, 1988, President Reagan discussed the significance of these two landmark Supreme Court decisions, simultaneously reaffirming the central importance of property rights to our constitutional system and the need to plan for inevitable just compensation obligations of the government:

> It was an axiom of our Founding Fathers and free Englishmen before them that the right to own and control property was the foundation of all other individual liberties. To protect these rights, the Administration has urged the courts to restore the constitutional right of a citizen to receive just compensation when government at any level takes private property through regulation or other means. Last spring, the Supreme Court adopted this view in *Nollan v. California Coastal Commission.* In a second case, the Court held that the Fifth Amendment requires government to compensate citizens for temporary losses that occur while they are challenging such a government regulatory "taking" in court. In the wake of these decisions, this Administration is now implementing new procedures to ensure that federal regulations do not violate the Fifth Amendment prohibition on taking private property; or if they do take a citizen's property for public use, to ensure that he receives constitutionally required just compensation.[10]

On March 15, 1988, President Reagan signed Executive Order 12,630, *"Governmental Actions and Interference With Constitutionally Protected Property Rights."*[11] Executive Order 12,630 draws heavily upon the regulatory coordination function of the Office of Management and Budget established by Executive Order 12291[12] and the Executive Order on federalism. Threads of the environmental assessment process under the National Environmental Policy Act are woven into the fabric of this Order, as are aspects of the budgetary planning process. Executive Order 12,630 reflects thoughtful consideration and vigorous debate throughout the affected government

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[10] President's Legislative and Adminstrative Message to Congress, 24 WEEKLY COMP. PRES. DOC. 91 (Jan. 25, 1988)
[11] Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).
[12] Exec. Order No. 12291, 3 CFR 128 (1981).

agencies, establishing a practical and workable procedure for implementing the Supreme Court's holdings in *Nollan* and *First English.*

The legitimacy of the Executive Order is premised both upon the duty of the government to respect constitutional protections afforded by the Bill of Rights and upon the management principle that government should not undertake programs without knowing and planning for their potential costs:

> Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.[13]

The Executive Order requires that "[i]n formulating or implementing policies that have takings implications, each Executive department and agency shall be guided" by the principles established in *Nollan* and *First English.* These "general principles," set forth in Section 3 of the Executive Order, include the doctrines of nexus and proportionality established by *Nollan* and the self-actuating right to just compensation set forth in *First English.* Although some actions are exempted from coverage, most traditional government regulatory functions fall within the scope of the Order. The presidential Order singles out permitting processes and the creation of restrictions upon private property use, requiring that all departments and agencies observe the doctrines of nexus and proportionality and that they minimize processing delays.

Perhaps the most challenging of the Order's requirements, however, is the takings implications analysis (or "TIA,") which must be prepared "before undertaking any proposed action regulating private property use for the protection of public health or safety" or for other purposes. When regulations focus on public health and safety purposes, the TIA must identify "with as much specificity as possible" the public health and safety risk created by the proposed private property use, establish that the proposed governmental action "substantially advances the purpose of protecting public health and

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[13] Exec. Order No. 12630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

safety against the specifically identified risk," establish that the proposed restrictions are "not disproportionate" to the landowner's contribution to the overall risk, and "estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking."[14] To encourage thoroughness and candor, the TIA will normally be considered an internal deliberative document not subject to production under the Freedom of Information Act, and, in any event, the Executive Order "is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person."[15]

Finally, the Order requires that the attorney general promulgate guidelines for the evaluation of risk and the avoidance of unanticipated takings "to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order."[16] This guidance discusses the constitutional principles that *Nollan* and *First English* established and, to some degree, also identified issues on which the Supreme Court had not at that time opined. To avoid obsolescence, the Attorney General was ordered to periodically review and update the guidelines to reflect subsequent clarification of constitutional principles by the Supreme Court. Those guidelines were issued on March 18, 1988. [17] They have not been reviewed or updated since.

The most important portion of the guidelines that the Attorney General has published to assist agencies in implementing the Order is that defining the nature of the taking. Takings under the Order currently include:

- Physical occupancies (includes formal condemnation exercises, utility easements, and access easements).
- Physical invasions where the invasions are of a recurring and substantial and recurring nature, i.e. flooding and overflight.

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] U.S. Attorney General, "Guidelines for the Evaluation and Avoidance of Unanticipated Takings (June 30, 1988.).

- Regulatory takings, as in regulations that may constitute a taking if it "goes too far."
- Regulatory takings that closely resemble or have the effect of a physical invasion or occupation of property.
- Regulations of an individual's property that are "disproportionate" to the degree to which the individual's property use is contributing to the overall problem.[18]

These definitions encapsulate the state of takings law at the time of the issuance of the Order. Needless to say, much has changed in the way of takings jurisprudence since 1988. We will later examine whether the takings liability of the United States government merits an update in the Attorney General's Guidelines. However, it is sufficient for our present purposes to simply explain the basics of the Order and the implementing Guidelines.

METHODOLOGY

To determine whether the Executive Order process, ostensibly in effect for fifteen years, had reduced government impairment of private property rights, we initially sought government records tabulating just compensation payments for inverse condemnation. We found none. We sought annual reports to OMB, which agencies are required to file under the Executive Order, summarizing takings judgments entered against those agencies. Again, we found none. We sought records or reports of TIA, required under the Executive Order. We found one prepared by EPA in 1990. We sought anecdotal evidence, and learned that many agency officials of this and prior administrations had never even heard of Executive Order 12,630, and were doing nothing to comply with it. Finally, we decided to undertake an examination of court records to at least find out how much court-ordered just compensation had been paid in cases filed after January 1, 1991 (a date after the Executive Order for which a database was available) through August 1, 2003.

We consulted the PACER database for a master list of all takings cases filed since 1991. Final dispositions of cases were available on PACER as well. Information from

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[18] *See id.* at Appendix, Section III(E)(2).

LEXIS/NEXIS and the Court of Federal Claims filled in the substantive gaps with respect to the federal agency, statute, regulation, or action challenged. We recognize that final awards of just compensation represent only the tip of the iceberg. First, litigation against the federal government is extremely expensive and time-consuming. Because most people simply cannot afford to file suit at all, the vast majority of regulatory takings go uncompensated in violation of the Constitution. Second, for those who do sue, records of settlement amounts are not available. We note that about twice as many cases are jointly dismissed (usually indicating settlement) as go to final judgment, suggesting that final judgments represent only about 33 percent of the total just compensation paid by the federal government. Finally, we note that many of the cases filed in this time period, including several seeking damages in the $100 million range, have yet to be decided. Consequently, we estimate that takings judgments represent only ten percent of inverse condemnations over this period. We therefore estimate that the $100 million in judgments represents approximately $1 billion in takings since 1991.

WHY CONSTITUTIONAL PROPERTY RIGHTS ARE IMPORTANT

The protection of rights in property lies at the heart of our constitutional system of government. The Founding Fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty dating back to the Justinian Code, Magna Carta, and the Two Treatises of John Locke, all of which recognize the importance of property ownership in a governmental system in which individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers vested him with the ability to deprive his subjects of their God-given rights of "life, liberty, and property."

The United States Constitution imposes a duty on government to protect private property rights. Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects . . . ." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation . . . ." The Fourteenth Amendment echoes the Due Process Clauses of the Fifth Amendment, stating

that no "State shall deprive any person of life, liberty, or property without due process of law . . . ." Additionally, the Contracts Clause of the Constitution indirectly protects property by forbidding states from passing any "law impairing the Obligation of Contracts."

The protection of private property receives such strong emphasis in the federal constitution because the right to own and use property was historically understood to be critical to the maintenance of a free society. To understand this concept, one must understand that property is more than just land. Property is buildings, machines, retirement funds, savings accounts, and even ideas. In short, property is the fruit of one's labor and the ability to use, enjoy, and exclusively possess the fruits of one's labor is the basis for a society in which individuals are free from oppression. Arguably, there can be no true freedom for anyone if people are dependent upon the state for food, shelter, and other basic needs. Under such a system, nothing is safe from being taken by a majority or a tyrant because the citizens, as government dependents, are powerless to oppose any infringement of their rights.

The United States has repeatedly explained that the primary purpose for protecting property rights is to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[19] During the birth and growth of the administrative regulatory state, federal government agencies ignored these principles and implemented policies that deprived owners of the use and benefit of their property without providing compensation. Moreover, Congress consistently failed to codify property rights protection into federal law and the judicial system's maze-like procedures and hurdles made seeking redress for the infringement of private property rights in the courts impractical for many property owners. Thus, private property rights have become one of our most endangered liberties.

FINDINGS

Under the Tucker Act,[20] all cases seeking just compensation from the federal government for the taking of property valued over $10,000 are heard in the U.S. Court of Federal Claims. From January 1, 1991 to August 1, 2003, approximately 500 takings

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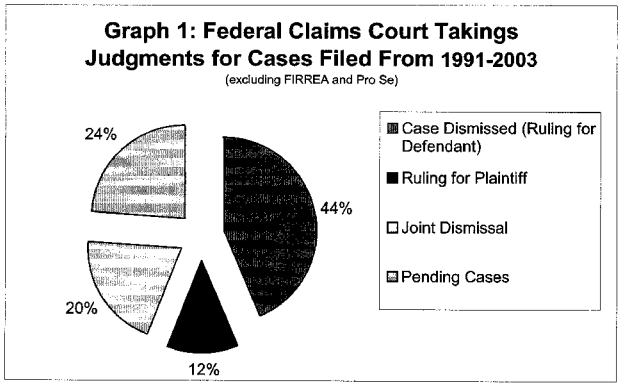
[19] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[20] 28 U.S.C. § 1491 (2003)

cases were filed in the U.S. Court of Federal Claims. Of those, approximately one-quarter are still pending.

In the group of all takings cases decided, the Court found in favor of the government and dismissed 44 percent of takings cases. Plaintiffs prevailed in about 12 percent of takings cases. Joint dismissals comprised an additional twenty percent, which generally represent settlements between the aggrieved property owner and the United States. Consequently, the focus of our study was the twelve percent of filed cases in which plaintiffs prevailed against the government.[21]



For cases filed from 1991 to August 2003, the CFC has handed down $111,966,012.10 in judgments. A breakdown of these successful takings cases by the

[21] With only a 12% rate of success is likely that many possible takings cases are never brought to trial. This pattern demonstrates the difficulty facing those individuals or organizations that have viable compensation claims against the federal government.

agency and statute or regulatory program challenged yields important findings with respect to the effect of the Order on protecting the public fisc.

Eleven of the forty-nine successful cases were brought against the Army Corp of Engineers. Another major offender was the Department of the Interior, with its Bureau of Land Management (BLM) accounting for six takings, and its Fish and Wildlife Service accounting for one. The Forest Service accounted for five cases, and the Environmental Protection Agency (EPA) accounted for three cases. The concentration of takings judgments against these agencies demonstrates a failure to adequately assess takings implications of their actions. Had the Executive Order been properly implemented by these agencies, we would not expect such a high concentration of takings judgments against them.

Certain regulatory programs were particularly likely to result in takings judgments. For example, the Corps of Engineers suffered takings judgments arising from the Wetlands Regulatory Program totaling $10,042,400. The Department of the Interior, which oversees the Fish and Wildlife Service and the Bureau of Land Management, together with the Forest Service (which manages federal forest land) were the targets of fourteen ultimately successful takings challenges filed in the Court of Federal Claims since 1991, resulting in $4,803,059.10 of takings liability. The EPA incurred $1,264,013.31 in takings liability, resulting from actions under Superfund.[22]

A 1998 report published by the Congressional Budget Office found that the Department of the Interior was also the target agency of 51 out of a total of 364 takings claims filed in the Court of Federal Claims between 1992 and 1997.[23] Between 1992 and 1997, twelve such cases resulted in a total of $322,678,000 in compensation awards from that Court.[24] These claims most often involved restrictions on the development of oil, gas, and mineral interests on federal lands.[25]

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[22] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2003).
[23] *See Congressional Budget Office, Regulatory Takings and Proposals for Change* at 9 (Dec. 1998), *available at* ftp://ftp.cbo.gov/10xx/doc1051/takings.pdf.
[24] *See id.*
[25] *See id.*.

The Interior Department's Board of Land Appeals has chastised the Department for failure to comply with the Executive order in an appeal brought against the Bureau of Land Management.[26] Stewart Hayduk had applied to the BLM under the Federal Land Policy and Management Act for a right-of-way on federal land to construct springs to water his livestock grazing grounds in Evanston, Wyoming, which the BLM denied. On appeal, one of Stewart's allegations included a takings claim. The BLM responded that this claim was frivolous, but presented no supporting evidence that they performed a TIA finding otherwise: "Additionally, while BLM declares its devotion to Exec. Order No. 11990 concerning Wetlands Protection, it makes no mention that it performed a Taking Implications Assessment pursuant to Exec. Order No. 12630. In the absence of such an analysis, boldly asserting that the takings claim is frivolous is premature."[27]

In another appeal of a right-of-way permit denial, this time a right-of-way for road construction to allow access to a residential subdivision, the Board of Land Appeals upheld the denial but nonetheless asserted that the "decision to deny the ROW prevents the development of the [applicant] subdivision."[28] The dissenting judge raised the takings implications of this denial, stating that under the Fifth Amendment, the BLM could not "prohibit access or be so restrictive as to make economic development competitively unprofitable."[29]

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[26] *See Stewart Hayduk*, 133 IBLA 346 (1995).
[27] *See id.* at 359 (Byrnes, J., concurring).
[28] *See Bear River Development Corporation*, 157 IBLA 37, 89 (2002)
[29] *See id.* at 94 (Roberts, J. dissenting) ("These principles [regarding access to property] surely apply to the Bear River case") (citing *Stewart Hayduk*, 133 IBLA 346, 359 (1995) (Byrnes concurring) ("BLM made no mention that it performed a Takings Implications Assessment pursuant to Exec. Order No. 12630").

SUPREME COURT TAKINGS DECISIONS SINCE 1988

The substantive problems affecting agency implementation of the Order are in part rooted in the fact that takings jurisprudence has evolved dramatically since 1988, and yet the guidelines are stuck in decades-old cement. Landmark cases of the Supreme Court decided since issuance of the Attorney Generals Guidelines include:

- ***Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)**

  The Supreme Court recognized the existence of a categorical taking:

  > The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land ... [because such regulations] carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm . . .We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[30]

- ***Dolan v. City of Tigard*, 512 U.S. 374 (1994)**

The Court held that, in order to decide whether conditions requiring the dedication of land to a city imposed as part of a city's approval of a lot owner's building permit constitute a compensable taking under the Fifth Amendment, a court must determine not only whether an essential *Nollan* nexus exists between legitimate state interests and the permit conditions, but also whether there is a "rough proportionality" between the conditions and the projected impact of the proposed development:

> We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment,

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[30] 505 U.S. 1003, 1015, 1018-19 (1992).

> should be relegated to the status of a poor relation in these comparable circumstances.[31]

- ***Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)**

The Tahoe Regional Planning Agency determined that Mrs. Suitum's lot was ineligible for development under agency regulations and instead gave her certain allegedly valuable "Transferable Development Rights" (TDRs) that she could sell to other landowners with the agency's approval. The Supreme Court held that the agency's determination that the lot was ineligible for development made Suitum's takings claim ripe for adjudication:

> There are two independent prudential hurdles to a regulatory taking claim brought against a state entity in federal court . . . . [First,] a plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from the "government entity charged with implementing the regulations" and "sought compensation through the procedures the State has provided for doing so. . . ." The first requirement follows from the principle that only a regulation that "goes too far" results in a taking under the Fifth Amendment.[32]

The Court found that the agency's decisions were final and that the lack of discretion the agency had over Suitum's land use following its determination rendered the requirement for Mrs. Suitum to take steps to obtain a final decision about permitted land use unnecessary.[33]

- ***Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)**

The Court held that Congress' imposition of retroactive liability for miners' health benefits resulted in the uncompensated taking of private property in violation of the Fifth Amendment. While Eastern's liability under the Coal Act does not represent the "classic taking" that occurs when "the government directly appropriates private property for its own," the Court concluded that "by operation of the Act," Eastern is "permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to the [Combined Benefit Fund]'." The Court insisted upon the

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[31] 512 U.S. 374, 391-92 (1994)
[32] 520 U.S. at 733-34.
[33] 520 U.S. at 739.

importance of remaining faithful to the Constitution and reiterated "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying or the change."

- ***Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998)**

The IOLTA program in many states requires many professionals to turn over interest generated by their clients' trust funds to a fund used to finance legal aid organizations. The Court ruled 5-4 in connection with the Texas IOLTA program that interest earned on client trust funds is the private property of the clients, the owners of the principal. In so holding, the Court noted that property interests are "determined by reference to 'existing rules or understandings that stem from an independent source su as state law.'"[34] In Texas, principal was a property interest, and interest accrued there "followed" the principal in terms of ownership. The Court refuted the argument that th interest was not property because it had no net economic value:

> While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. As such, "The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected.[35]

The Court also rejected the characterization of the interest as government-created value, since mandating the accrual of interest "does not mean the State . . . is entitled to assume ownership of the interest.[36]

- ***City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999)**

The city of Monterey repeatedly denied various proposals by Del Monte Dunes to develop a 37.6-acre parcel located in the city--each time imposing more rigorous demands on the developers. Upholding a 4.5 million dollar jury verdict for the landowner, the Supreme Court stated:

> Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed

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[34] 524 U.S. at 164.
[35] 524 U.S. at 171.
[36] 524 U.S. at 171.

> by the Constitution, to provide just compensation. When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well. *See Gardner* v. *Village of Newburgh, supra,* at 166, 168 ("To render the exercise of the [eminent domain] power valid," the government must provide landowner 'fair compensation'; 'until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government' to deprive plaintiff of his property rights . . . .").[37]

- ***Palazzolo v. Rhode Island,* 533 U.S. 606 (2001)**

The Court held that a property owner is not barred from recovering just compensation for taking of his wetland, even though the regulation was promulgated before the owner required possession of the regulated property:

> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions . . . The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. [38]

- ***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002)**

The Court held that the two temporary moratoria on development, one lasting twenty-four months and the other eight months, ordered by the Tahoe Regional Planning Agency were not *per se* takings of property requiring compensation under the Takings

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[37] 526 U.S. at 718.
[38] 533 U.S. at 627.

Clause: "The starting point for the court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then Penn Central was the proper framework . . .the default remains that, in the regulatory takings context, we require a more fact specific inquiry." The court shied away from a *per se* rule in this case because only a temporal slice of the parcel was affected, not the "parcel as a whole." Furthermore, the "interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations." The Court instead held that "the interest in fairness and justice" weighed in favor of applying the *Penn Central* multifactor analysis to the moratoria at issue.[39]

- ***Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003)**

In a follow up to the *Phillips* decision, the Court held that the transfer of interest generated under the IOLTA program to a legal services foundation for use in tax-exempt law-related charitable and educational purposes was a *per se* taking "more akin to the occupation of a small amount of rooftop space in *Loretto*." However, since "just compensation" is measured by the property's owner's loss rather than the government's gain, no compensation is due for this confiscation since the IOLTA account does not generate net interest. "Because that just compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case."[40]

FEDERAL CIRCUIT COURT TAKINGS DECISIONS SINCE 1988

The Court of Appeals for the Federal Circuit has jurisdiction over appeals from all takings claims brought against the federal government. Thus, in addition to Supreme Court decisions, the decisions of both the Federal Circuit and the Court of Federal Claims (which hears all takings claims against the federal government over $10,000) also form rich sources of takings jurisprudence. Since 1988, the Federal Circuit has decided dozens of takings cases, and the Court of Federal Claims has (as noted earlier) decided over 400. Takings guidelines for federal agencies cannot possibly be complete without a thorough analysis of the thousands of pages of these decisions as well.

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[39] 535 U.S. at 331, 339-42.
[40] 123 S.Ct. at 1421.

A few of these landmark decisions are: *Florida Rock Industries v. United States*[41] (wetland), *Palm Beach Isles Assoc. v. United States*[42] (wetland), *Loveladies Harbor, Inc. v. United States*[43] (wetland), *Tabb Lakes, Ltd. v. United States*[44](wetland), *Forest Properties, Inc. v. United States*[45] (wetland), *Walcek v. United States*[46](wetland), *Whitney Benefits, Inc. v. United States*[47] (FMCRA), *Cienega Gardens v. United States*[48] (HUD subsidized housing), *Yancey v. United States*[49] (poultry regulations).

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[41] 18 F.3d 1560 (Fed. Cir. 1994).
[42] 231 F.3d 1354, 1357 (Fed. Cir. 2000)
[43] 28 F.3d 1171 (Fed. Cir. 1994).
[44] 10 F.3d 796, 802 (Fed. Cir. 1993).
[45] 177 F.3d 1360 (Fed. Cir. 1999).
[46] 303 F.3d 1349 (Fed. Cir. 2002).
[47] 926 F.2d 169 (Fed. Cir. 1991).
[48] 2003 U.S. App. LEXIS 11656 (Fed. Cir. 2003).
[49] 915 F.2d 1534 (Fed. Cir. 1991).

APPENDIX I

Successful Takings Claims Against The Army Corps of Engineers

Case	Action Challenged	Judgment or Settlement Amount
Abney Farms, Inc., et al v. United States, 92-274L (Fed. Cl. 1997)	1990 flooding of private property resulting from maintenance of high dam levels	$252,000.00
Bob's Resort, Inc. v. United States, 92-195L (Fed. Cl. 1996)	Landslide from Corps dam	$295,000.00
Briggs Family Land, et al v. United States, 97-571L (Fed. Cl. 2001)	1994 flooding of property from Corps dam	$2,140,000.00
Cooley, et al v. United States, 324 F.3d 1297 (Fed. Cir. 2003)	Temporary permit denial (1993-1996) under the Clean Water Act	$2,065,200.42
F.A. Properties v. United States, 94-88L (Fed. Cl. 1997)	1992 establishment and implementation of wetland mitigation requirements under Clean Water Act	$80,000.00
Koconis v. United States, 94-517L (Fed. Cl. 2000)	Denial of Clean Water Act permit to fill wetland property	$880,000.00
McDonald, et al v. United States, 37 Fed. Cl. 110 (1997)	Flooding of property resulting from Army Corps of Engineers project	$374,000.00
Reis, et al. v. United States, 97-678L (Fed. Cl. 2000)	1994 flooding of property from Corps dam	$255,000.00
Roberge, et al v. United States, 92-753L (Fed. Cl. 1995)	1992 Corps delineation of property as wetlands prevented sale by owner	$338,000.00

APPENDIX II

Successful Takings Claims Against The Department of Interior

Case	Action Challenged	Judgment or Settlement Amount
Andrews, et al v. United States, 96-804L (Fed. Cl. 2001)	Bureau of Land Management's designation of private property as Nationally Significant Lands; filed in 1996	$156,580.00
Devon Energy Corp. et al v. United States, 45 Fed. Cl. 519 (1999).	Bureau of Land Management's denial (1992-1997) of drilling permit application	$380,000.00
Hege, et al v. United States, 96-763 (Fed. Cl. 2000)	Forest Service's designation of private property as Nationally Significant Lands; filed in 1996	$50,000.00
Holden, et al v. United States, 95-321L	Bureau of Land Management's 1991 closure of federal lands on which plaintiffs held unpatented mining claims.	$65,000.00
Lewis v. United States, 91-1390L (Fed. Cl. 1994)	National Park Service's change in river path resulting in physical taking; filed in 1991	$240,000.00
McPhee, et al v. United States, 96-794L (Fed. Cl. 1998)	Forest Service's designation of private property as Nationally Significant Lands; filed in 1996	$100,000.00
Moncrief v. United States, 97-565L (Fed. Cl. 2001)	Bureau of Land Management's denial of drilling permits; filed in 1997	$3,000,000.00
Payne v. United States, 31 Fed. Cl. 709 (1994)	Bureau of Land Management's 1991 closure of federal lands on which plaintiff held unpatented lode mining claims after plaintiff submitted notice for proposed mineral exploration drilling	$32,000.00

Pettro v. United States, 47 Fed. Cl. 136 (2000).	Forest Service's temporary denial of access (1996) to minerals on national forest prevented landowner from exercising his right to remove sand and gravel from his property	$74,479.10
Speerex Ltd , et al v. United States, 97-351L (Fed. Cl. 2000)	Bureau of Land Management's anticipated rejection of oil and gas drilling permits (1996) under Wilderness Act	$110,000.00
Steele, et al v. United States, 94-302L (Fed. Cl. 1996)	Forest Service's 1984 designation of patented mining land as "Wilderness Area" which led Service'sto order plantiffs to cease mining work there in 1990	$120,000.00
Store Safe Redlands v. United States, 35 Fed. Cl. 726 (1996).	Forest Service's 1991 restrictions on grazing privilges resulted in taking of vested range stock water rights	$300,000.00
Taylor v. United States, 99 131-L (Fed. Cl. 2002)	Fish and Wildlife Service's delayed issuance (1998-2002) of incidental take permit under Endangered Species Act	$175,000.00

APPENDIX III

Successful Takings Claims Against The Environmental Protection Agency

Case	Action Challenged	Judgment or Settlement Amount
Bassett, New Mexico v. United States, 55 Fed. CL. 63 (2002)	CERCLA remedial efforts (1997-98)	$361,650.00
Colorado Paint Co. v. United States, 91-1622L (Fed. Cl. 1996)	CERCLA remedial efforts (1991)	$847,613.31
Millard v. United States, 95-649L (Fed. Cl. 1999)	CERCLA remedial efforts (1991)	$54,750.00

Defenders of Property Rights is the only national public interest legal foundation dedicated exclusively to protecting property rights.

Defenders was founded in 1991 on the belief that society can achieve many important objectives – such as protection of our environment and preservation of our national heritage – without destroying private property rights or undermining the free market.

The Fifth Amendment's Just Compensation Clause provides that, "No person shall be…deprived of life, liberty or property without due process of law nor shall private property be taken for public use, without just compensation." The mission of Defenders of Property Rights is to ensure that the Fifth Amendment's guarantee be given the full effect of the law.

Defenders promotes the protection of property rights using a three-pronged approach:

Education: Defenders educates the public about the importance of private property and how those rights are at risk by government actions. Defenders also helps government officials better understand the constitutional limitations placed on their power and help them to see the negative consequences of their actions.

Litigation: Defenders represents in court individuals seeking compensation for the unconstitutional taking of their property.

Legislation: Defenders analyzes and comments on proposed legislation to ensure the constitutional requirement of vigorous property rights protection is reflected in the law.

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MATERIAL SUBMITTED BY MR. ECHEVERRIA

No. 03-5101

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Plaintiff-Appellee,

v.

UNITED STATES

Defendant-Appellant.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN 99-CV-119
SENIOR JUDGE ERIC. G. BRUGGINK

BRIEF OF THE AMICI CURIAE STATES OF MAINE, ALABAMA, ALASKA, CALIFORNIA, FLORIDA, GEORGIA, MASSACHUSETTS, MICHIGAN, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OREGON, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF THE UNITED STATES FOR REVERSAL OF THE JUDGMENT IN FAVOR OF THE PLAINTIFF-APPELLEE

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I. Interests of the *Amici Curiae*.

The states joining in this brief regulate the commercial harvesting of fish and other marine resources within their waters, which, with certain exceptions, lie up to three miles off of their respective coasts.[1] These state laws may include significant restrictions on the amounts of fish that are allowed to be harvested, as well as the manner in which the fish may be taken – such as prohibitions or restrictions on types of equipment or vessels that may be used in commercial fishing. See, e.g., 12 M.R.S.A. § 6171 (authorizing the Maine Department of Marine Resources to limit the taking of marine resources by time, method, number, weight, length and location); RCW 77.04.012 (authorizing the Washington Department of Fish and Wildlife to regulate the manner in which that State's fishery resources are exploited). The ability to control fishing effort, including by limiting or prohibiting entry of persons and vessels permitted to take fish and even the total closure of a particular fishery, sometimes on an emergency basis, are all essential tools to the management of the states' fisheries and marine resources for economic,

[1] Under the federal Magnuson Act, 16 U.S.C. §§ 1801 et seq., the United States Congress and agencies that it so designates have authority to manage and regulate fisheries in the waters of the United States that, with certain exceptions, lie from three to two hundred miles off-shore. Each coastal state has parallel authority to manage and regulate fisheries as specified in the Magnuson Act, generally speaking within the three-mile limit of its coast. Of course, the *amici* states of Ohio and Michigan, while not coastal, have similar interests in the regulation of commercial fisheries within the Great Lakes.

conservation, public health and other public purposes. In taking these measures, the states rely upon basic and long understood legal principles that fisheries are a public resource[2] and that permits to take fish confer not property rights, but revocable privileges that are continuously subject to the states' authority and

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[2] It is a long settled principle that fish in the sea are public resources until lawfully caught.

> Under the common law of England all property right in animals ferae naturae was in the sovereign for the use and benefit of the people. The killing, taking, and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the federal Constitution. Geer v. Connecticut, 161 U. S. 519, 527, 528, 16 Sup. Ct. 600, 40 L. Ed. 793 (other citations omitted). There is no private right in the citizen to take fish or game, except as either expressly given or inferentially suffered by the state. State v. Tice, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469.

Cawsey v. Brickey, 144 P. 938 at 939 (Wa. 1914). See, also Maine v. Tamano, 357 F. Supp. 1097 (D. Me. 1974) ("It has long been established by decisions of the Supreme Court, and of the Supreme Judicial Court of Maine, that a State has sovereign interests in its coastal waters and marine life... which interests are separate and distinct from the interests of its individual citizens.") id. at 1100, citing McCready v. Virginia, 94 U.S. 391 (1876) ("The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been lawfully granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents the people in their sovereign united capacity.") id. at 394 (citations omitted). See Tlingit and Haida Indians of Alaska v. United States, 389 F. 2d 778 (Cl. Ct. 1968).

responsibility to actively manage fisheries within their waters in the public interest. Unlike private property subject to the Constitution's takings clause, fisheries in public waters are a public resource.

These state programs, and the principles upon which they are founded, will be threatened if this Court upholds the decision of the United States Court of Federal Claims in this case. The Claims Court determined that laws enacted by Congress, invalidating and refusing to renew fishing permits for vessels over a certain size to take certain species in waters of the United States, amounted to a "temporary taking" of the claimant's *fishing vessel*. It is vital to the states that they remain able to make management decisions restricting the manner and method of taking the public's fisheries without the apprehension of being subjected to takings claims for these actions.

II. Facts Significant to this Case.

In its decisions below, the Claims Court spectacularly awarded $37 million based upon a finding of a temporary taking arising out of acts of Congress that prevented the licensing of oversize vessels in fishing for herring and mackerel in waters of the United States.[3] The court determined that Congress' actions had effected a complete loss of the profit-making value of Appellee's vessel for the

[3] Appellee's motion for summary judgment, asserting a Fifth Amendment taking of its vessel, was granted by the Court of Claims at 49 Fed. Cl. 36 (2001). The enormous takings damages were awarded by the Court at 55 Fed. Cl. 575 (2003).

period in question. The court came to this conclusion contrary to the following significant facts, which are drawn from the court's own findings:

(1) At all times, Appellee was well aware of the heavily regulated and dynamic nature of the government's regulatory management of commercial fisheries.

(2) During most of the time when Appellee was investing heavily in equipping its vessel, its owners were specifically aware that federal regulatory agencies and Congress itself were deeply concerned about the dramatically large capacity of its vessel and the potential impacts on the fisheries involved as well as on the traditional fishing industry in the affected waters.

(3) Recognizing the risk of loss of its permits under these circumstances, Appellee made the business judgment to take out an insurance policy from Lloyds of London that protected against this risk, and, when this very risk was realized, millions were paid out under this policy.

(4) Appellee then proceeded to make economic use of its vessel to fish for mackerel and herring in foreign waters, although that use did not yield the same profits that Appellee contends it would have made if its U.S. permits were left undisturbed and continuously re-issued.

(5) The takings damages awarded by the Court of Claims included what it found to be Appellee's lost profits, extending well beyond the expiration dates of its revoked permits, as if Appellee had an entitlement to the continuous renewal of these permits notwithstanding Congress' prohibition on renewal.

(6) Appellee ultimately sold its vessel *for a net profit.*

III. Argument.

Even accepting all of the trial court's factual findings as correct, it is difficult to conceive of a more legally incorrect outcome in this case, nor one that could have greater chilling effect on the ability of government to actively manage the public's fisheries.

A. Appellee Had No Compensable Property Interest.

Perhaps the most dramatic element of the Court of Claims' ruling is its determination that Congress' enactments revoking Appellee's permits to fish for herring and mackerel in the waters of the United States, and prohibiting renewal of those permits in the future, created a constitutional taking of Appellee's *vessel.* There is no known precedent supporting this conclusion, and it stands in diametric opposition to this Court's ruling in Conti v. United States, 291 F. 3d 1334 (Fed. Cir. 2002), which is controlling. In Conti, the plaintiff claimed a constitutional taking of his license, vessel and fishing gear arising out of the federal

government's prohibition of use of that vessel, as it was equipped, for gillnet swordfishing. This Court applied its traditional, regulatory takings test, requiring a claimant to establish that (1) it owns a compensable property interest, and (2) that property interest has been taken by the government's regulation. 291 F. 3d at 1337, relying upon M&J Coal Co. v. United States, 47 F. 3d 1148 (Fed. Cir. 1995).

As to Conti's asserted property right, this Court viewed the interest conferred by the federal fishing permit as a revocable license and not a compensable interest in property. 291 F. 3d at 1340-42. See, e.g., United States v. Fuller, 409 U.S. 488 (1973); Alves v. United States, 133 F. 3d 1454 (Fed. Cir. 1998). Applying traditional notions of property law, this Court found that Conti's ownership of his vessel and equipment remained intact,[4] potentially useful for other fishing or available for sale, but that he had no property interest in his federal permit to use this equipment for the particular purpose of taking swordfish, even though he had been permitted to do so in the past. Just as in the present case, that permit lacked all of the indicia of property ownership, since it could not be assigned or sold, did not confer exclusive rights, held no promise of renewal and

[4] Contrary to the Court's clear determination in Conti, even if there were a property interest in a fishing license, it does not follow that the denial of that license translates into a taking of a fishing vessel. To use a parallel example, a denial of a driver's license, even if legally incorrect, would not create a constitutional taking of the driver's motor vehicle.

contained no guarantee against revocation. See, Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986); Mitchell Arms v. United States, 7 F. 3d 212 (Fed. Cir. 1993), affirming 26 Cl. Ct. 1 (1992). Indeed, Conti could hardly have argued (and he did not) that he owned profit-making rights in the fish themselves, which, until lawfully harvested, remain a public resource subject to plenary government management and control. To underscore these points so that there can be no mistake, the Magnuson Act and corollary regulations place all on notice that fishing permits may be suspended, revoked or modified at any time. 16 U.S.C. §§ 1853(d)(3)(D), (d)(2)(A); 50 C.F.R. § 648.4(m).

The Court of Claims below seems to have attempted to distinguish Conti from the present case on the grounds that this Court in Conti had not evaluated whether the government action had taken the claimant's vessel and gear. This is not correct. This Court in Conti fully considered both whether the government's action had taken Conti's permit, his gear *and* his vessel, as Conti had claimed. 291 F. 3d at 1338-9. Because Conti retained all the attributes of ownership of his tangible property, and could continue to use it in other fisheries or sell it, this Court concluded that the fundamental attributes of his property had been left untouched. Id. The fact that the loss of his permit had an economic impact on Conti's use of his gear and vessel, this Court found, did not result in the government's appropriation of that property. Id. See also, Burns Harbor Fish Co. v. Ralston, 800

F.Supp. 722 at 726 (S.D. Ind. 1992). The exact same is true here. While Appellee's permits to fish for certain species of a public resource in United States waters were rescinded, its fundamental attributes of ownership in its fishing vessel were unaffected.

The present case is legally on all fours with Conti. The Court of Claims erred in finding that Appellee had a property interest that was implicated when Congress took action to revoke and refuse to renew its permits to fish for herring and mackerel in waters of the United States.

B. Appellee Lacked Any Reasonable, Investment-Backed Expectations Necessary to its Takings Claim.

Property interests are often evaluated in terms of investment expectations. "[The Supreme] Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124-25 (1978) (citations omitted).[5] Particularly with regard to takings cases relating to personal business

[5] While this discussion focuses on the reasonable expectations of the property owner, Appellee fails as well the other two considerations of the traditional Penn Central, three part takings analysis. (1) The "character of the government action" in this case was to deny permits to take a public resource in federally regulated waters, not the kind of government action that should give rise to a constitutional

property used under government permits to access public resources, Congress' enactments revoking and prohibiting renewal of those permits do not result in a constitutional taking.

Both this Court in Conti and the District Court in Burns Harbor rejected claims that the purchase of personal property in connection with the business of fishing, coupled with a permit to fish for a particular species, created a reasonable expectation to continue fishing under that permit. Such an expectation is clearly unreasonable where the regulatory system puts all on notice that a permit may be revoked or the type of gear may be banned in the future. As the Burns Harbor Court explained, this condition derives from the fact that, when the government issues a permit allowing access to a publicly owned resource, the government retains the right to reclaim that access and there can be no reasonable expectation otherwise. 800 F. Supp. at 728.

Appellee made its investment with the fullest knowledge that commercial fisheries are heavily and dynamically regulated by the government. Indeed, knowing the regulatory risks that it was taking on, Appellee purchased an insurance policy to hedge against the risk of its permits being revoked, and then proceeded to recover under that policy when Congress took action to do so.

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taking of a vessel. (2)There was no diminution of value of the vessel in this case; the vessel was economically used and then sold for a profit.

Moreover, during virtually the entire period of 1997, when Appellee was actively engaged in investing in outfitting its large vessel for catching herring and mackerel, Appellee was *specifically* aware of the federal government's concern over the sheer capacity of its vessel and its potential effect on fisheries and traditional fishing industry. During this time, as the Claims Court found, Appellee attended Congressional hearings and meetings with key legislators in an effort to deter the actions that Congress took later that same year to revoke its permits and subsequently to prohibit their re-issuance. Even without Congressional action the federal regulatory agencies explicitly retained the right to suspend, revoke or nullify the fishing permits at any time. 50 C.F.R. § 648.4(m).

In sum, throughout virtually the entire period of its investment, Appellee could (and did) clearly foresee the speculative risks that it was taking, and acted to insure against those risks. Finally, contrary to the vast damages awarded by the Court of Claims, Appellee had no legally cognizable expectation whatsoever, no less a property right, that its permits would be renewed. The expiration dates of its permits closely followed the date when its vessel's outfitting was complete and ready for deployment, and Appellee was certainly not entitled to continuous permit renewals.

Courts have long emphasized that rights sufficient to support a takings claim cannot arise in a business voluntarily entered into, which, from the start, is known

to be subject to pervasive government regulation. See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986); Dames & Moore v. Regan, 453 U.S. 654 (1981); Andrus v. Allard, 444 U.S. 51 (1979); Mitchell Arms v. United States, 7 F. 3d 212 (Fed. Cir.1993). When an investment is made in a highly regulated industry, reasonable expectations must be based not only on then-existing regulations but also on the recognition that there may well be changes in those regulations in the future that are adverse to the economic interests of a particular business. Branch v. United States, 69 F. 3d 1571 (Fed. Cir. 1995); Atlas Corp. v. United States, 895 F. 2d 745 (Fed. Cir. 1990). The Magnuson Act itself provides a comprehensive and pervasive federal regulatory scheme reflecting congressional intent to occupy the field of fisheries management within federal waters, and, as noted above, specifically states that permits to take fish are not property rights and may be revoked at any time.

In short, it is hard to conjure up a set of facts where a claim could be so lacking in the sort of reasonable expectations necessary to a successful takings challenge. Indeed, the Court of Claims in this case acknowledged as much when it wrote "under existing precedent, it is far from clear that the Takings Clause is implicated." 49 Fed. Cl. at 44. Appellee was simply engaged in a business gamble, one in which it was ultimately made financially whole, but now Appellee demands a multimillion dollar windfall as a constitutionally protected property right.

C. Appellee Suffered No Economic Loss Justifying a Constitutional Taking.

Even if Appellee were found to be vested with a property right that the government had taken, it suffered no economic damage, no less that which would justify a constitutional taking. See Brown v. Legal Foundation of Washington, 123 S. Ct. 1406 (2003). A constitutional taking does not occur simply because the claimant is frustrated in realizing the profits that it had hoped for in its economic venture. See Andrus v. Allard, 444 U.S. 51 (1979). If it were as Appellee would have it, compensable takings would be so commonplace that government could hardly function.

In the instant case, Appellee was able to use its vessel to fish for herring and mackerel in foreign waters. It also benefited from substantial sums recovered under its insurance policy protecting it against the known risk of the government's refusal to allow it to fish in U.S. waters. And, it ultimately sold its vessel for a net profit. There is simply no precedent supporting a takings determination based upon a claimant's speculative hopes of maximizing the profits of its business venture.

D. Whatever Constitutional Scrutiny might Apply to the Government's Actions in This Case Would Lie Under the Due Process Clause, Not the Takings Clause.

There was no constitutional impediment to Congress taking action, as it did, to stop Appellee from deploying its enormous vessel to fish for herring and mackerel in U.S. waters. However, even if one were to advocate for a

constitutionally imposed limitation on these facts, the proper analytical framework would be under the Constitution's due process clause rather than the takings clause. In this regard, the Court of Claims misapprehended the significance of the Supreme Court's collective opinions in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). 49 Fed. Cl. at 45-46. In Eastern Enterprises, the majority of Justices (comprised of Justice Kennedy in concurrence and Justices Stevens, Souter, Ginsburg, and Breyer in dissent) agreed that the applicable framework for evaluating a retroactive law unfairly causing substantial financial loss to a business venture should be the due process clause. Where such retroactivity results in upsetting long settled transactions in a fundamentally unfair way, the due process clause may be applicable in judging the validity of the legislative measure.

The Court in Eastern Enterprises was confronted with a Congressional enactment retroactively imposing a very heavy financial burden on a company that had left the regulated business and settled its affairs *decades* earlier. While the Court struck down this law, the majority of the Justices found that the appropriate constitutional framework for doing so was the due process clause. Of course, the Court of Claims has no jurisdiction to strike down a law on this basis. Instead, the court attempted to fashion an incorrect remedy under the takings clause, by overlooking fundamental takings principles that reject the existence of a compensable property interest when the government's action relates to permits it

has granted to take a public resource but leaves ownership of the privately owned property intact.

Even applying the due process clause to this case, there is nothing in Eastern Enterprises or in other known precedent that would justify a declaration of invalidity of Congress' enactments here. Unlike the plaintiff in Eastern Enterprises, during most of the time of its investment Appellee was on notice of the prospect of regulatory intervention in its proposed business. Also unlike Eastern Enterprises, Congress' action here was prospective not retroactive. Appellee had no right or reasonable expectation to the continuation of its permits to fish for herring and mackerel in U.S. waters, and certainly none to renewals of those permits. By any analysis, the Congressional enactments in question were not in violation of the Constitution.

IV. Conclusion.

The Court of Claims erroneously found that Congress committed a constitutional taking of Appellee's vessel. This determination should be overturned as clearly inconsistent with established case law of this Court and of the Supreme Court.

Dated: August ___, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey Pidot, Chief of the Natural Resources Division for the Office of the Attorney General in the State of Maine, attorney for the *Amici Curiae*, herein certify that, on August ___, 2003, the Brief of the *Amici Curiae* in Support of Reversal of Judgment was filed by dispatch to Federal Express for overnight delivery to the United States Court of Appeals for the Federal Circuit in accordance with Fed. R. App. P. 25(a)(2)(B). I hereby certify that I also served two copies of the Brief on the following parties by way of Federal Express, overnight delivery:

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